THE NEUTRAL MERCHANT AND CONTRABAND OF WAR AND BLOCKADE

By SIR FRANCIS PIGGOTT

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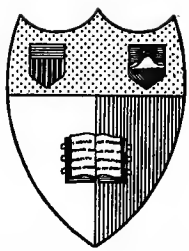

THE NEUTRAL MERCHANT

THE

NEUTRAL MERCHANT

IN RELATION TO THE LAW OF CONTRABAND OF WAR AND BLOCKADE UNDER THE ORDER IN COUNCIL OF 11TH MARCH 1915

BY

SIR FRANCIS PIGGOTT

LATE CHIEF JUSTICE OF HONG KONG

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THESE articles appeared this year in the April, August, and September numbers of *The Nineteenth Century and After*, and I have to thank the Editor for allowing me to reprint them so soon after publication. They are a justification of the much-attacked Order in Council of 11th March, 1915.

In reply to the German submarine menace the British Government resorted, by way of Reprisals, to a method of strangling the enemy's commerce which, on the one hand, was wider in its scope than any list of contraband, and, on the other, was free from the 'legal niceties' which surround a declaration of blockade. Neutral merchants declared that it hit them hard, and the Government of the United States protested that it exceeded the limits which international law has placed to the right of a belligerent to interfere with neutral trade. The British Government replied justifying its action, and there, one would imagine, the matter should have rested for arbitration after the War. But the Government of the United States has continued its protests, has indeed just renewed them in most

vigorous language, desiring to deflect us, in the interests of its commerce, from a course which must materially assist in crushing our enemy.

It is not customary, except in one clear case, for a neutral Government to insist that a belligerent should adopt, *in medias res*, its views of a question which does not involve any issue of peace or war: to press on him, *in medium bellum*, a modification of his belligerent action which might cost him the victory. The clear case of exception is when, philosophy at fault, there are not two sides to the question, but one only, and that testified to by flagrant breaches of the laws of humanity and war. Everything else is fair fighting; and for a neutral Government, because its own commercial interests are affected, to insist on the adoption of its view of a debateable point, to persist that it is not debateable, to take action, in itself a violation of international law,[1] savours of unneutral service. In the absence of suggestion of anything but perfect good faith, in the face of much demonstrated care of the interests of its citizens, the abandonment by a neutral Government of the dispassionate attitude which neutrality requires not merely heartens the enemy but must result in rendering him material assistance.

The United States Government, by placing England and Germany on the same plane of protest, —the 'lawless conduct' of the belligerents—has,

[1] The *caveat* of the United States Government, published in *The Times*, 24th July, 1915. This action is considered in the second article, at p. 90.

as it seems to me, lost the true measure of national right and wrong on which humanity must rest its laws if civilisation is to continue. In redressing wrongs the law has never placed injuries to life and property on the same level. A neutral Government whose citizens have suffered in life by the action of one belligerent, in fortune, however grievously, by the action of the other, must yet be guided as to the manner of its protests by the relative degree of the offences.

Now, assuming England's high-sea policy to be illegal, two things appear to me clear: First, that we are entitled to claim from the United States a consideration of the circumstances which led to the commission of the offence of which we are accused, in order to see whether, as Reprisals, it was not justified. The Protest of the 2nd of April expressly refuses this consideration; it proceeds on the assumption that Reprisals can never be resorted to against an enemy, if the interests of a neutral trader are affected: Secondly, that, quite apart from the Arbitration Treaty, we are justified in insisting on a reference to arbitration after the War as the complete present answer to the charge, for this all-sufficient reason, that on calm review it may appear that our action is warranted by international law. There is no indication in the last paragraph of the new Protest that this view is acquiesced in by the United States.

Reduced, therefore, to its simplest expression, the position taken up by the United States

is this: Our trade is of greater importance than your victory. Admitting the hypothesis to the full that a neutral country has no interest in the result of a war, is unconcerned which side wins, yet I do not believe that this attitude finds any warrant in the principles on which international law is based. But there is another and very practical reason in favour of my second contention. Too strenuous a protest is apt to make men look a little below the surface of mere words, to turn their attention curiously to trade statistics. They have been dexterously handled in the British answers. A neutral Government is not the best judge of its merchants' claims; inevitably it becomes their advocate, and in the tangle of discussion is apt to identify itself with commercial transactions which, it is common knowledge, often need the closest investigation. The true position of a neutral Government, the almost complete severance from its protection of merchants who deal, however indirectly, with a belligerent, demands, I venture with great deference to assert, an altogether different attitude from that taken by the United States Government.

International law has of late been the subject of much loose talk, by the German especially; and some colour has been lent to his assertions by the nature of the American Protests to Great Britain. International law does not profess to govern the conduct of belligerents between them-

selves, but only the laws of war. Except in so far as these have been incorporated in conventions, except in so far as the principles of humanity have been reduced into concrete words and so have become laws binding the consenting nations when they fight, it is not the province of international law to mitigate the blows of war.[2] A neutral Government is not concerned with the methods of warfare adopted by a belligerent until they ape the barbarian. Then, even in the absence of convention, it is entitled to protest in the name of our common humanity. Conventions to which both belligerents and the neutral are parties entitle it to support its protest by diplomatic action. But, convention or no convention, more strenuous action is justified by the application of elementary legal principles when its citizens, pursuing their normal avocations, are injured.[3] International law, properly understood, governs the relations of belligerents with neutrals. Its sanctions are not belligerent action, nor any action against the alleged offender, which may even indirectly benefit the enemy. Arbitration after the

[2] The book recently published by the French Foreign Office setting forth the crimes of the German Government is, with great and customary accuracy, entitled 'Les violations des Lois de la Guerre par l'Allemagne.'

[3] As by the sinking of a merchantman on which its citizens are travelling, without warning and without affording them proper means of escape, or by the dropping of bombs on an unfortified town in which its citizens are residing. If such neutral citizens are injured, elementary legal principles deprive the belligerent, become barbarian, of the plea that he did not know of their existence

War, and compensation, are the only remedies when neutral property has been injured. Then, and only then, can the principles of international law be calmly discussed; then, and only then, can any new departure by a belligerent be tested by a reference to fundamental principles. The reason is obvious. International law is a progressive science; it has not yet pronounced its last word on the relations between belligerency and neutrality. A neutral Government is not entitled to assume that it alone is the judge of what that last word will be.

These fundamental principles have been lost sight of in the Protests of the United States to Great Britain. Yet there never was a case in which calm discussion was more necessary, for we have come to a point when the question is definitely raised whether international law is to stand still where the last war left it, or whether its principles are sufficiently elastic to allow of their adaptation to modern developments of the machinery of war. I say deliberately that this calm discussion must result in the completest justification of the Order in Council; if it does not, the doom of international law is certain.

But the discussion which has arisen round the Order in Council has one peculiar feature. It is, I suppose, one of the blessings resulting from freedom of speech that our own people should criticise the action of their Government, even when the country is engaged in a conflict which must be fought out to the bitter end. To

so much of the world as lies beyond the shadow of the clouds of war, that little fragment of it which is still capable of calm thinking, this curious spectacle has been presented, that to the passionate assertions of the Central Powers, to the dispassionate threats of the United States, there has been added the angry criticism of our own people, in which the press and correspondents, of high and low degree of learning, have joined without remorse. I have looked in vain for one defender of the faith.

Assuredly American dialectic needed no such heartening; the insistence that the American view of international law is alone worthy to be received needed no such support as it has had from our own people. It is true that some of them have been inspired by the British desire that, whate'er betide, England must fight fair. But the end which the angry criticism had in view, and professes to have achieved, was not this at all; it was that the Government should take other steps to accomplish what had already been accomplished by the Order in Council, should decline on a range of lower action, and a narrower line of legal thought. The new Protest, in paragraph 19, does not fail to make the point. Whatever it may be worth, the distinguished chemists, foremost among the critics, are responsible for furnishing the United States with the argument.

The demand for action, so strenuously expressed,

during the Cotton-Contraband discussion, entirely ignored what the Government had already done. There may have been cause for criticism as to the effectiveness of executive action. I do not profess to know; but whether this were so or not, it was not to be remedied, as it was attempted to be remedied, by an attack on the validity of the Order in Council. It was said that many lawyers are agreed that it was invalid. I have ventured to present the other side for public consideration.

A system of law, though intermittently created as occasion has arisen, must, if it is to be taken as serious law, stand the test of an evolutionary analysis. The doctrines of contraband and blockade cannot stand for a moment if they are based on no principle, if they go no further back than the commentators have carried them.[4] I have endeavoured to show that the principle on which both are based is the same, and is to be found in the Right of War: that both are the inevitable consequences affecting neutral merchants who have any relations with the enemy of the exercise of legitimate belligerent action against him, and that they originate in, and, though varying in the intensity of its action, are both linked with sea-power and the efficiency of its visible agent, the Fleet. That German commerce should have received its death-blow, that neutral merchants should have suffered in consequence, are the

[4] See the footnote on p. 95.

natural, the inevitable results of the command of the sea which in fair fighting in times past England has won for herself.

But there has been introduced into the controversy an expression, the mere mention of which seems to send men's minds dancing with unreason—the 'Freedom of the Sea.' Very dexterously, the Germans have substituted for it another expression, the 'Equality of the Sea.' In spite of the captivating simplicity of the words, it is used with sinister intent, in the hope to redress the inequality of the hostile Fleets.

If a Fleet is a legitimate weapon of offence and defence for nations whose borders are on the sea, then the fortune of one aspect of war between them must rest with the superior Fleet, and when war does come the imagined equality of the sea, whether for belligerents or for neutrals who cross the track of it, vanishes.

The 'freedom of the sea' is a cry for something as inarticulate as the other things that the wild waves are saying. It means no more, no less, than does the freedom of the King's highway, which is subject to a multitude of other rights often reducing it to nothing. The ingenuous pacifist sees in it the fulfilment of the promise that wars shall cease. Yet if that and all the other fanciful ideas which have gathered round it—the 'neutralization of the sea,' for example—come to prevail, wars will indeed cease, but in a way the pacifist least dreams of.

Hidden in that imagined 'freedom,' and the 'rules' which have been suggested to ensure it, lies the power of the Strong to make one final war upon the Weak on land, and the end of it the annihilation of the Small Nations; for it means this, that when they are attacked they must defend themselves without help in munitions of war from neutral merchants across the sea.

The 'freedom of the sea' is not even complete in time of peace, for it may not be set up by those who have violated the laws of the nations which border its shores. But when war comes the 'freedom of the sea' must give way to the rights of war; and no one dare *now* deny that to declare war may be a sacred right, to decline the gage of battle an infamy. The only freedom that remains, and even this is curtailed by the right of search, is that of neutral merchants to carry on their trade with one another unmolested, so long as it does not deliberately enmesh itself in the lines and areas of battle. But it must never be forgotten that the United States is not vindicating the simple right of neutral nations to trade with one another untrammelled by belligerent action. It maintains, and all the struggles of its advocacy are devoted to establishing this proposition, that 'innocent shipments may be freely transported to and from the United States through neutral countries to belligerent territory.'[5] Here, then,

[5] See p. 85.

is the whole matter 'bounded in a nut-shell.' It is admitted that a belligerent may forcibly prevent *all* goods going from a neutral directly to the enemy: it is admitted that he may also prevent certain specified goods (called 'contraband of war') going from a neutral indirectly (that is, through another neutral country) to the enemy. The United States protests that international law ends with these two propositions: that there is no underlying principle linking the two admissions, making them only two illustrations of a larger fact: that there is a chasm between them that can never be bridged, even though not merely the conditions of war, but also the constitution of armies have changed: that international law must stand at the point it reached ten years ago, and a belligerent stand passively by while neutral merchants sustain the enemy with the things which give him life to continue the fight.

The mere statement of the dispute shows that the calm of a High Tribunal of Arbitration is the only atmosphere conducive to its just discussion.

That right of war upon the sea, as well as that pure right of neutral traders upon the sea, the Mistress of the Seas must steadfastly maintain, for she holds them in trust for the nations and may not barter them away. Above all, she must know her own mind as to what that right is. She has spoken with full knowledge, and, as I

believe, rightly. It would be a grievous blow to her prestige if she were now to abandon the position she has taken up. I cannot imagine such an abandonment to be even dreamed of.[6]

The scheme of these articles is as follows. In the first, published before the American Protest of the 30th of March was received, I have dealt with the principal points in the early American Notes to Great Britain and Germany, and have traced a process of evolution to which all the principles of contraband and blockade, as we used to know them, do in fact conform. In the second, after combating Mr. Norman Angell's project for the neutralization of the sea, I have shown how this process of evolution warrants, by a legitimate process of development, the practice laid down by the Order in Council. In the third, I have applied these principles to the discussion to which the Government yielded when it put cotton on the list of contraband.

Two questions lie altogether outside the scope of the articles. First, the policy which, prior to the issue of the Order, refrained from making cotton contraband. Secondly, the policy which guides executive action in carrying out the Order.

[6] 'The Government will use all its belligerent rights, whatever they may be, whether under the Order in Council, or under the law apart from that Order' (Lord Robert Cecil, House of Commons, 19th Oct. 1915). 'The Foreign Office is profoundly anxious to enforce to the utmost our blockade rights. . . . Taking the broad results, the blockade of Germany had been a great success, and not a great failure' (Lord Robert Cecil, House of Common, 2nd Nov. 1915).

They deal simply with the Order as it stands, not with the method of its enforcement.

I have, for the greater stability of my edifice, used the reinforced concrete of the logic and arguments which Sir William Harcourt created in the famous, but almost forgotten, 'Letters of Historicus,' incorporating in the footnotes more extended quotations from those Letters. In a few instances I have added a paragraph to the articles as they originally appeared, for the sake of greater clearness.

I trust that the manner in which I have set forth what I conceive to be the true law of the dispute will give no offence to my friends in the United States. I am sure it will not, for some who took part in the Behring Sea Arbitration are still among the Minority, and they will remember that those discussions did not want for strenuousness with Phelps of counsel for the United States, and Charles Russell for England.

F. T. P.

November, 1915.

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THE NEUTRAL MERCHANT

I

THE NEUTRAL MERCHANT:

THREE AMERICAN NOTES AND THE ANSWERS

[*April* 1915]

The 'Letters of Historicus'—General Position of the Neutral Merchant—Use of Neutral Flags by Merchantmen to Escape Capture or Destruction—First American Note to Great Britain—British Interim Reply—The Complete Reply—First American Note to Germany—German Reply—Evolution of the Doctrines of Contraband of War and Blockade—Meaning of Neutrality—Contraband of War—Conditional Contraband—Declaration of Paris as to Freedom of Neutral Goods and of Enemy Goods under Neutral Flag—Prize Courts—The Conflicting Rights of Neutral Merchants and of Belligerents—The Right and Duty of Search—Doctrine of Continuous Voyages—Embargo—Blockade—The New Policy of the British Government—Foreign Enlistment—Proclamations of Neutrality.

THE intellectual barometer stands at 'Hazy' on the subject of neutrality, even in this country. In Germany it has ceased to register anything which even pretends to be intelligent. In the United States there are what might aptly be called cyclonic and anti-cyclonic disturbances. If my view as to English knowledge of the subject be questioned, I would ask my readers how often they have of late met in the newspapers the phrase 'duties of neutrals,' and what answer they have

found to the inevitable query, 'Which be they?' Within the last few weeks I read a contribution to *The Times* from 'A Legal Correspondent,' in which these duties were referred to in most bewildering fashion. He said that there existed special bonds between this country and the United States; that both have stringent Foreign Enlistment Acts; that both agree to what are known as the 'Three Rules' of the Washington Treaty as to the duties of neutrals, and that both had promised to bring these Rules to the notice of other States. This statement was painfully misleading; the 'Three Rules' were agreed to as the basis on which the Alabama arbitration was to be decided, and related solely to the subject known as 'Foreign Enlistment.'[1] But if by 'duties

[1] The 'Three Rules' are contained in Article 6 of the Treaty of Washington, 1871, by which the settlement of the Alabama claims was arranged. It provided that: 'In deciding the matters submitted to the Arbitrators, they shall be governed by the following three rules, which are agreed upon by the High Contracting Parties as rules to be taken as applicable to the case, and by such principles of international law not inconsistent therewith as the Arbitrators shall determine to have been applicable to the case. A neutral Government is bound—first, to use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a Power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted, in whole or in part, within such jurisdiction, to warlike uses. Secondly, not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men. Thirdly, to exercise due diligence in its own ports and waters, and, as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties. Her Britannic Majesty has commanded Her High Commissioners and Plenipotentiaries to declare that Her Majesty's Government cannot assent to the foregoing rules as a statement of principles of inter-

of neutrals ' is meant, as I presume to be the case, the duties of neutral Governments, they can be summarised in one great negative—to do nothing, except when they are called on to defend their neutrality against the action of either belligerent, *inter alia*, in the cases provided for by the Hague Convention of 1907 relating to neutrality. So far-reaching is this universal negative that it includes non-interference with their merchants in their dealings with belligerents.[2] If, however, the term refers to duties of neutral merchants, then it is inapt and misleadingly inaccurate; for the existence of any such general duty as to cease trading, for which the Germans are so strenuously contending, is wholly imaginary.

Fifty years ago another continent was riven with war, and there was much talk of what a neutral might do, and might not do; and there

national law which were in force at the time when the claims mentioned in Article 1 arose, but that Her Majesty's Government, in order to evince its desire of strengthening the friendly relations between the two countries and of making satisfactory provision for the future, agrees that in deciding the questions between the two countries arising out of those claims, the Arbitrators should assume that Her Majesty's Government had undertaken to act upon the principles set forth in these rules. And the High Contracting Parties agree to observe these rules as between themselves in future, and to bring them to the knowledge of other maritime Powers, and to invite them to accede to them.

[2] This is expressly declared by Article 7 of the Hague Convention of 1907, No. 13, 'respecting the Rgihts and Duties of Neutral Powers in Maritime War,' which is as follows:—'A neutrsl Power is not bound to prevent the export or transit, for either belligerent, of arms, munitions of war, or, in general, of anything which could be of use to an army or fleet.' The full meaning of this article is made specially clear by its juxtaposition with Article 6, which provides that 'The supply, in any manner, directly or indirectly, of war-ships, supplies, or war material of any kind whatever, by a neutral Power to a belligerent Power, is forbidden.'

appeared in *The Times* a series of letters signed 'Historicus,' in which, among other things, the elementary principles of neutrality were very strenuously and very lucidly set forth. Very strenuously, for there was a certain M. Hautefeuille who had filled the world—like the Dernburgs of to-day—with much unsound doctrine. Now unsound doctrine was a thing which stirred Mr. Vernon Harcourt to the depths of his soul, and those only who have heard him know what waves of wrath surged up in his brain. He had the art of transferring to paper the billowy language he was wont to use; and as you read you hear the rotund sentences rolling onwards to swamp the frail bark of his adversary. But he had another art: of clear thinking and lucid exposition. In the series of Whewell Lectures which I attended at Cambridge in the year of grace ——, of which I still preserve my notes, he seemed to make plain the whole mystery of Public International Law. New times have produced new teachers of the old heresies; and it is good to turn once more to the pages of the 'Letters of Historicus,' for again the neutral nations are invited to 'upset the whole fabric of international law which the reason of jurists has designed and the usage of nations has built up.' To adapt his references [3] to Burke

[3] *Letters of Historicus*, p. 121:—'The recent unfortunate evasion of the *Alabama* has given rise to much discussion on the general duty of a neutral Government with respect to the trade of its own subjects with the belligerents in contraband of war. One might have supposed that if there were any question which the authority of accredited writers, the definitions of public documents, and the universal practice of nations, had clearly and decisively ascertained, it was this very question on which, unhappily, there seems to prevail a most general and unfortunate mis-

and Canning to himself, ' I would that we had yet amongst us his multitudinous eloquence and his poignant wit to do justice upon this presumptuous sciolism ' of the German Foreign Office. The world, indeed, seems still to need his teaching. From what one hears in the market-place I gather that there is a vague feeling in the air that our case is not *quite* so good as we should like it to be ; that there is a mysterious crevice in our armour-joints through which, if not the German, at least Uncle Sam has pricked us. There is a nebulous ' something ' about neutrality, especially about ' neutral duties,' which seems to preclude accurate thinking ; and even the ' Legal Correspondent ' does not always pierce the haze. So the student, in memory of an hour spent after lecture in his master's rooms in Neville's Court, when kindly patient, and so lucidly, he expounded to him the meaning of a difficult decision, will endeavour to weave into a continuous whole the threads of the doctrine which he taught. It is not that people do not know; only that they forget.

The neutral merchant is the centre round which

apprehension. This misapprehension, grave as it is in the exasperation which it is calculated to produce between friendly nations, is not altogether inexplicable. We have the misfortune to live in days when, in the name of liberalism, philanthropy, and civilisation, we are invited to upset the whole fabric of international law which the reason of jurists has designed and the usage of nations has built up, and to rear upon its ruins the trumpery edifice of a shallow caprice. It is the old story of that pretentious philosophy which, by a recurrence to first principles, attempted with so little success to operate the regeneration of mankind. I would that we had yet among us the multitudinous eloquence of Burke or the poignant wit of Canning to do condign justice upon this presumptuous sciolism.'

the principal doctrines of international law dealing with neutrality have gathered. It seems strange at first that in time of war the commercial rights of a mere money-making civilian should invariably form the subject of endless discussions; but this civilian really holds a very important position in the waging of war; it could not go on without him. Each belligerent has need of him, and it is essential to each to prevent the other from satisfying that need. To block the enemy's communications with the neutral merchant is one of the surest ways of ending the war. To this end many ingenious things have been devised, and as many equally ingenious to counteract them; and in this the merchant's fertile brain has materially assisted. The problem is a complex one, for each belligerent as a buyer must strive to keep him in a good humour, but as a fighter must do all he can to thwart him. As for the neutral merchant himself, he is calmly indifferent to the merits of the fight; nothing pleases him so much as to be 'Jack of Both Sides.' He will take all he can get from one side and cry out for more from the other. When the War is over we may muse philosophically on some aspects of the Protest which the United States Government has addressed to Great Britain on behalf of its merchants; for the present, with all its serious issues hanging in the balance, the American Notes require careful study, for they themselves raise an issue as serious as any which the War has raised—whether Great Britain has been true to the principles she has so often preached, or whether the German accusation, or the American suggestion, that she

has violated them can be substantiated; whether, when all is over, we shall be able to say proudly that it has been War with Honour.

The Use of Neutral Flags by Merchantmen

Two Notes have been addressed to Great Britain, and it will be convenient to refer at once to the second Note, which deals with the use by our merchantmen of neutral flags. The neutral merchant is directly concerned with this custom of the sea, for he may have cargo on board, and if this means of deceiving the enemy's warships is declared to be illegal he runs the chance of its being sent to the bottom.

The facts which gave rise to the Note are of the simplest. On the 30th of January two German submarines appeared off Liverpool, and, giving the crews ten minutes to take to the boats, torpedoed and sank some British merchant vessels. On the 6th of February the *Lusitania*, coming up the Irish Channel at the end of her voyage from New York, hoisted the Stars and Stripes and came safely to harbour. To these simple facts are to be added, according to the German version, that the Admiralty advised the master by wireless to hoist the American flag; or had issued a secret order to merchant ships in general to hoist a neutral flag in the circumstances. Whether these facts are accurate or not is absolutely immaterial; but the Germans have based on them the charge of violation of international law. It should be noted with surprised wonder that the German Admiralty seems

to have forgotten that the *Emden* sailed into Penang harbour flying the Japanese ensign, and that this, added to her other disguises, enabled her to accomplish her raid successfully.[4] The United States Government, having been appealed to by Germany, addressed a Note to Great Britain, to the great jubilation of her adversary; for she had just planned the infamy of her new piracy, and the smart of the thrashing administered to herself was somewhat mitigated by the fact that the other boy got a 'wigging' too. The position of the United States is so delicate, her diplomatic officers have achieved so much, her people have done and said so many things that have gone to our hearts, that it is impossible to be querulous at the presentation of the Note; yet, when it is analysed, it seems to go far beyond what was necessary to the occasion, and it has enabled Germany to confuse, in her usual clumsy fashion, the *post* and the *propter* in the sequence of events.

The Government of the United States reserved for future consideration the legality and propriety of the deceptive use of the flag of a neutral Power in any case for the purpose of avoiding capture; but pointed out that the occasional use of the flag of a neutral or of an enemy under stress of immediate pursuit, and to deceive an approaching enemy, was

a very different thing from the explicit sanction by a belligerent Government for its merchant ships generally

[4] This was generally accepted as a fact at the time this article was written. It must, however, now be noted that the Captain of the *Emden* has denied it.—*F. T. P.*

to fly the flag of a neutral Power within certain portions of the high seas which, it is presumed, will be frequented with hostile warships. A formal declaration of such a policy for the general misuse of a neutral's flag jeopardises the vessels of a neutral visiting those waters in a peculiar degree by raising the presumption that they are of belligerent nationality, regardless of the flag they may carry.

The Note declared that the United States would view with anxious solicitude any such general use of its flag; it would afford no protection to British vessels, it would be a serious and constant menace to the lives and vessels of American citizens, and a measure of responsibility for their loss would be imposed on the Government of Great Britain.

The reply of the British Government was short and to the point. It dwelt on the fact that the Merchant Shipping Act sanctions the use of the British flag by foreign merchantmen in time of war for the purpose of evading the enemy; that instances are on record when United States vessels availed themselves of this facility during the American Civil War, and that, therefore, it would be contrary to fair expectation if now, when the conditions are reversed, the United States and neutral nations were to grudge to British ships liberty to take similar action. 'The British Government,' it continued, 'have no intention of advising their merchant shipping to use foreign flags as a general practice, or to resort to them otherwise than for escaping capture or destruction.' Finally, the responsibility for the loss of neutral vessels in such circumstances must

fall on the nation which had deliberately disregarded the obligations recognised by all civilised nations in connexion with the seizure of merchant ships.

It is clear that the American Note had special regard to the future, and expressed no opinion as to what had occurred in the case of the *Lusitania*. Now she did not fly the American flag to escape capture, but to escape the probability of being unlawfully sunk by a German submarine; for, in view of what had already happened off Liverpool, it is more than probable that a submarine was in lurking for her; to judge from the German irritation at her escape, it is practically certain. What she did, therefore, was in self-defence, and even unlawful things become lawful when they are done to escape extreme danger. The Note refers to the use of a neutral flag to escape capture, the reply justifies it, and the Merchant Shipping Act sanctions it. But, seeing that capture by the enemy is equivalent to destruction, quite apart from the methods of the new piracy, there can be no doubt that the principle of self-defence covers this case also. Self-defence is a natural law which has been embodied in all legal systems, and Nature has sanctioned it as a special plea. 'Protective coloration' is the device by which she defends the weak from the unscrupulous strong; it is 'mimesis,' a mimetic change, which Nature not only approves in the case of actually hunted animals, but also and mainly devises for those which are likely to be hunted. So the analogy is complete, and the change of her 'colours' by

the *Lusitania* to escape the lurking danger of the submarine stands justified by both natural and human law. I prefer this explanation to the theory of the *ruse de guerre.*

By a *ruse de guerre*, or stratagem of war, I understand the adoption of some means of deceiving the enemy in war, some device out of the ordinary course of fighting. The old adage that ' all is fair in love and war ' is not strictly true, for some stratagems are not unjustifiable in war, and some are. The *Emden*, when she rigged up a fourth funnel, so making believe she was some other ship, resorted to a legitimate stratagem which had unfortunate results for our Allies' ships in Penang harbour. The German soldiers who put on our dead men's uniforms also resort to a stratagem; but we are fastidious in our methods of fighting, and do not admit that this is ' playing the game ' of war. But, whether legitimate or illegitimate, these are *ruses de guerre*; and the term is hardly applicable to a stratagem adopted by a non-combatant to avoid an unlawful trap set by the enemy for his destruction.

The First American Note to Great Britain

I pass now to the more serious matter of the Note of friendly protest of the 28th of December, which was an amplification of one already presented on the 7th of November. It opens with the declaration that the present condition of the trade of the United States, resulting from frequent seizures and detentions of cargoes destined

to neutral European ports, has become so serious as to require a candid statement of the view of the United States Government that the British policy is an infringement of the rights of its citizens, and denies to neutral commerce the freedom to which it is entitled by the law of nations. An improvement had been confidently awaited on account of the statement of the Foreign Office that the British Government 'were satisfied with guarantees offered by the Norwegian, Swedish, and Danish Governments as to the non-exportation of contraband goods when consigned to named persons in the territories of those Governments.' But although nearly five months had passed since the War began, it was a matter of deep regret to find that the British Government

> have not materially changed their policy and do not treat less injuriously ships and cargoes passing between neutral ports in the peaceful pursuit of lawful commerce which belligerents should protect rather than interrupt. The greater freedom from detention and seizure which was confidently expected to result from consigning shipments to definite consignees rather than 'to order' is still awaited.

The general principle is then laid down that, 'seeing that peace, and not war, is the normal relation between nations,'

> the commerce between countries which are not belligerents should not be interfered with by those at war unless such interference is manifestly an imperative necessity to protect their national safety, and then only to the extent that it is a necessity.

But articles on the list of absolute contraband consigned to neutral countries from America have been seized and detained 'on the ground that the countries to which they were destined have not prohibited the exportation of such articles.' Italy had prohibited the export of copper, and shipments to Italian consignees or 'to order' cannot be exported or transhipped; copper can only pass through that country if it is in transit to another country. Yet the British Foreign Office had 'declined to affirm that copper shipments to Italy will not be molested on the high seas.'

In the case of conditional contraband there is a presumption of innocent use when it is destined to neutral territory; yet the British authorities had seized and detained cargoes without

being in possession of facts which warranted a reasonable belief that the shipments had in reality a belligerent destination as that term is used in international law. Mere suspicion is not evidence, and doubts should be resolved in favour of neutral commerce, not against it.

Cargoes had, in fact, been seized 'because of a belief that, though not originally so intended by the shippers, they will ultimately reach' the enemy. A consignment of conditional contraband shipped to a neutral port does not raise a presumption of enemy destination; such a presumption is directly opposed to Lord Salisbury's statement, made during the South African war, as to foodstuffs (equally applicable to all conditional contraband) which, 'though having a hostile destination, can be considered as contraband only if they are for the enemy forces. It is not sufficient that

they are capable of being so used. It must be shown that was in fact their destination at the time of their seizure.' As to concealed contraband, it is conceded that there is a right to detain neutral ships when there is sufficient evidence to justify belief that contraband articles are in their cargoes; but the ships cannot be taken into port and there detained 'for the purpose of searching generally for contraband, or upon presumptions created by special municipal enactment which are clearly at variance with international law and practice.' Many of the industries of the United States are suffering 'because their products are denied long-established markets in European countries which, though neutral, are contiguous to the nations at war.' The effect on trade is not entirely cured by reimbursements for damages suffered when an enemy destination has not been established; 'the injury is to American commerce as a whole through the hazard of the enterprise and the repeated diversion of goods from established markets.'

Resolved into its simplest expression, the complaint is a criticism of the way in which the doctrine of 'continuous voyages' has been applied by the British Government; but there is also a veiled criticism of the doctrine itself; and, by way of further complaint, it is pointed out that the embargoes which have been declared in certain countries have proved insufficient to prevent the doctrine being applied. As to the principle asserted that doubts are to be resolved in favour of neutral commerce, it has no warrant in common sense,

for it puts a premium on the neutral merchant's ingenuity, an ingenuity which has itself given rise to the doctrine of 'continuous voyages.' Seeing that commerce is in the balance against a nation's existence, the doubt must obviously be resolved in favour of the more important consideration. The Note is also open to the general criticism that it is based on the position of the vendor and ignores the purchaser. But the true criterion of destination must often be found in the intentions of the neutral purchaser of which the neutral vendor may be ignorant.

An interim reply was sent by the British Government on the 7th of January. It begins with a cordial concurrence in the general principle that a belligerent should not interfere with trade between neutrals unless such interference is necessary to protect the belligerent's national safety, and then only to the extent to which this is necessary; with this qualification, however, that

> we shall endeavour to keep our action within the limits of this principle, on the understanding that it admits our right to interfere when such interference is, not with *bona-fide* trade between the United States and another neutral country, but with trade in contraband destined for the enemy's country, and we are ready, whenever our action may unintentionally exceed this principle to make redress.

The figures showing the export of copper from the United States in 1913 and 1914 to Italy, Sweden, Denmark, and Switzerland ('countries which, though neutral, are contiguous to the nations at war') are then compared, and their

astonishing increases duly noted. The conclusion is very clear.

> With such figures the presumption is very strong that the bulk of the copper consigned to these countries has recently been intended not for their own use, but for that of a belligerent who cannot import it direct.

Granted the soundness of the American proposition, the British case falls within it; the 'imperative necessity for the safety of the country' has arisen. As to concealed contraband the case is even clearer. Cotton is not on the list of contraband. But information has reached the Government that 'precisely because we have declared our intention of not interfering with cotton, ships carrying cotton will be specially selected to carry concealed contraband; and we have been warned that copper will be concealed in bales of cotton.' For this there is only one remedy: the cargo must be examined and the bales weighed; further, this cannot be done at sea, therefore the ship must be brought into port. The general justification of the action of the British Government is couched in these weighty words, which go to the foundations of the whole law of contraband and the right of search: 'We are confronted with the growing danger that neutral countries contiguous to the enemy will become, on a scale hitherto unprecedented, a base of supplies for the armed forces of our enemies and for materials for manufacturing armament. . . . We endeavour, in the interest of our own national safety, to prevent this danger by intercepting goods really destined

for the enemy, without interfering with those which are *bona-fide* neutral.'

The extraordinary procedure adopted by the United States Government of *prohibiting* the publication of manifests within thirty days after the departure of vessels from American ports, obviously increased the difficulties of the British Government in exercising its right of search even in the most ordinary circumstances. If I am right in my view that the duty of neutrals is to do nothing, for the simple reason that any action may be of assistance to one of the belligerents, it must be confessed that this order comes perilously near to a breach of neutrality.

The reply deals also with the seizure of foodstuffs, but it is unnecessary, in view of subsequent action taken in regard to them, to refer to this part of the document. It also mentions a somewhat unusual complaint, not included in the American Note, of our own embargo on rubber, imposed in consequence of a new trade in exporting rubber from the United States in suspiciously large quantities to neutral countries, which had sprung up since the war. The complaint is not very intelligible, because it looks at embargo from the wrong point of view. The right point of view is explained later in this article.

The full reply of the British Government was dated the 10th of February. It contained the very important declaration that our action against neutral vessels 'has been limited to vessels on their way to enemy ports or ports in neutral countries adjacent to the theatre of war, because

it is only through such ports that the enemy introduces the supplies which he requires for carrying on the war.' In other words, the importance of the doctrine of 'continuous voyages' at the present time is emphasised; and its necessity is demonstrated by a further review of trade statistics, which led to the inevitable conclusions 'that not only has the trade of the United States with the neutral countries in Europe been maintained as compared with previous years, but also that a substantial part of this trade was, in fact, trade intended for the enemy countries going through neutral ports by routes to which it was previously unaccustomed.'

But even more important is the opinion deliberately expressed that international law, like every other judge-made law, is a live body of principles which can and must keep abreast of the times. Its rules are not arbitrarily devised as occasions arise, but are based on principles which have developed with the progress of the world. Any apparent changes in the law which Great Britain has introduced are not arbitrary inventions which have in view merely the crushing of Germany, but are justified by well-known principles applied to new conditions. The process of adaptation is no new one. The advent of steam-power had a notable influence on the development of the law, for the facilities introduced by steamers and railways, while they simplified the task of the neutral merchant in contraband, had enormously magnified the difficulties of the belligerent.

The question in issue can be stated in almost

primitive fashion. Are the rules which governed the rights of belligerents when there were no railways, to govern them when the transit of contraband over the frontier of a neutral and a belligerent State has been made so easy? The answer is not an absolute negative; it is that the old principles are living principles and are capable of extension to meet the new occasions.

But to explain the reasons for a step which has already been taken and to find sound reasons for a step which has to be taken are two different things. The first requires reasoning power, the second imagination; and I find this in the position boldly taken up and courageously insisted on, that the growth in size of ocean liners has rendered a further amplification of the old rules necessary. They must be brought into port for examination.

The American loves the cut and thrust of argument, and must at once have acknowledged that the reference to the fact that the doctrine of 'continuous voyages' originated with the Judges of the United States was not a *tu quoque*, but a brilliant illustration of the principle of development of the law. It is abundantly clear from every paragraph of this remarkable reply that this doctrine has become the one principle worth fighting for now, for our national safety depends on it. And the American will appreciate the delicacy of the compliment which can find no stronger arguments than those used by the Judges of the United States Prize Courts when they established it.

The earlier American Note of the 7th of

November had contended that 'the belligerent right of visit and search requires that the search should be made on the high seas at the time of the visit, and that the conclusion of the search should rest upon the evidence found on the ship under investigation, and not upon circumstances ascertained from external sources.' But the major premiss is that the actual destination of the vessel to the neutral port may be merely a cloak for the real destination of the cargo to the enemy; and the citation from the judgment in the case of the *Bermuda*[5] is a complete answer:

> The final destination of the cargo in this particular voyage was left so skilfully open . . . that it was not quite easy to prove, with that certainty which American Courts require, the intention, which it seemed plain must have really existed. Thus to prove it required that truth should be collated from a variety of sources, darkened and disguised; from others opened as the cause advanced, and by accident only; from coincidences undesigned, and facts that were circumstantial. Collocations and comparisons, in short, brought largely their collective force in aid of evidence that was more direct.

To introduce the rigid rules of evidence necessary to a common-law action in a question which is not a lawsuit at all, but an inquiry, would obviously cripple the effectiveness of the doctrine of 'continuous voyages'; the occasions with which that doctrine deals have by force of circumstances become the most important source of supply of those commodities which a belligerent must at all hazards prevent his enemy obtaining. And

[5] Wallace's (U.S.) Reports, p. 514.

if we go back to the root-principle, that the whole law and every part of it depend on the right of self-defence, no stronger argument is necessary to justify the principle laid down in this case, nor for the provisions of the Order in Council of the 29th of October, which throw the burden of proof of his innocence on the neutral owner of contraband.

The First American Note to Germany

I now come to the Note to Germany of the 12th of February, delivered in consequence of the notification of her under-sea policy, and for which 'Warning' is the only appropriate term. The statement of the principles set at defiance is introduced by the satirical formula 'It is unnecessary to remind,' the whole object of the Note being to remind the German Government that the interference with the freedom of the sea is limited to search and blockade, and that in the absence of effective blockade the belligerent nationality or contraband character of the cargo must be determined before a vessel may be destroyed.

To this Note came the German reply which set forth England's iniquities and violations of international law, which were in startling contrast to the scrupulous observance of 'valid international rules regarding naval warfare' by Germany. There is a complacent reference to the American Note to Great Britain of the 28th of December, which sets out the details of our iniquities 'sufficiently, though not exhaustively'; but the main interest of the document is its

method of dealing with the duties of neutral States towards Germany.

Neutrals have been unable to prevent the interruption of their commerce with Germany, which is contrary to international laws.

Germany is as good as cut off from her overseas supply by the silent or protesting toleration of neutrals not only in regard to such goods as are absolute contraband, but also in regard to such as, according to the acknowledged law before the war, are only conditional contraband or not contraband at all. Great Britain, on the other hand, is, with the toleration of neutral Governments, not only supplied with such goods as are not contraband or only conditional contraband, but with goods which are regarded by Great Britain, if sent to Germany, as absolute contraband—namely, provisions, industrial raw material, etc.—and even with goods which have always indubitably been regarded as absolute contraband.

There follows a reference ' with greatest emphasis ' to the enormous traffic in arms which is being ' carried on between American firms and Germany's enemies ' ; after which come two sentences most typical of German occultness :

Germany fully comprehends that the practice of right and toleration of wrong on the part of neutrals are matters absolutely at the discretion of neutrals and involve no formal violation of neutrality. . . . If it is the formal right of neutrals to take no steps to protect their legitimate trade with Germany, and even to allow themselves to be influenced in the direction of conscious wilful restriction of their trade, on the other hand, they have a perfect right, which they unfortunately do not exercise, to cease contraband trade, especially in arms, with Germany's enemies.

The involutions of these astonishing sentences

are worthy of the White Queen at her best, and it is quite a difficult exercise to arrive at their meaning. So far as I have been able to get at it, it is something like this :—Trade is free; you neutral merchants have a right to trade with Germany as with Great Britain; why don't you? That would be the 'practice of right.' Germany has as much right to have you trade with her as Great Britain has; why do you deny her that right? You allow yourselves rather 'to be influenced in the direction of conscious wilful restriction' (in other words, you submit to having your cargoes seized by Great Britain). Of course you have the right to take no steps to protect your legitimate trade with Germany, and you take none (in other words, you refuse to resist the seizures of your cargoes by force); that is 'the toleration of wrong.' And so you cease to trade with Germany. But you have also a perfect right to cease trading in contraband (especially in arms) with Great Britain. Why don't you? In her case you do not allow yourselves 'to be influenced in the direction of conscious wilful restriction.' To all of which the neutral merchants reply: When you begin to make an appreciable attack upon our trade with Great Britain and seize our cargoes, then you may be sure that we shall be influenced 'in the direction of conscious wilful restriction' of that trade also. But until that time arrives, we regret that we cannot take the risk of having to run the gauntlet of the British Fleet. In all seriousness these mysterious sentences mean no more than that Germany has lost such influence upon the sea as

she ever had, and the neutral merchant has made a note of it and governs himself accordingly. Therefore the traffic in arms, in spite of her pathetic protests, must go on.

THE EVOLUTION OF THE DOCTRINES OF CONTRABAND OF WAR AND BLOCKADE

So much for the Notes and the Answers, and I pass to the realm of international law.[6] In a recent debate in Parliament a noble Lord suggested that, in view of German disregard of it, we need not be 'too fastidious' in our application of its principles.[7] Even at the best of times, before war shook things to their foundations, the layman was disposed to look on it as a thing of shreds and patches. I am sure he would be surprised to hear that the principles are coherent, and that there is a thread of simple common-sense running through all the various doctrines. The fate of the Empire depends on the action which the Government takes on these important questions, its honour on this action being strictly in accordance with the law which the nations have agreed to. I make no apology, therefore, for treading once more the well-beaten track, for I take it that it is the business of the good citizen to know what he is talking about, and in order to help him I shall begin at the very beginning. And the beginning is War.

[6] A sketch of the view of international law presented in this article appeared in some letters by the present writer to the *Daily Dispatch*.

[7] The Earl of Crawford, in the debate in the House of Lords on Naturalisation, 6th January, 1915.

The Meaning of Neutrality

At the outbreak of war the nations are divided into two classes : those that are fighting and those that are not. To give them their scientific names, they are belligerents and neutrals. With the laws of war I do not concern myself, but only with those principles by which neutrals are supposed to govern themselves in order to avoid being swept into the vortex.

The only means by which this most desirable object can be achieved is by steadfastly bearing in mind the natural consequence of meddling in other people's frays. It gives rise to the very simple maxim ' He who joins himself to my enemy makes himself my enemy and may be treated as such.' For the world's peace the doctrine ' He that is not with me is against me ' finds no place in the maxims of nations. Now there is a root-principle of neutrality, and if it is once let go all the subordinate principles will fly off and become isolated bodies careering through intellectual space, and doing an incalculable amount of damage. This principle is, that neutrality is a state appertaining to the Governments of the non-belligerent countries, and to the Governments alone. Azuni says [8] that ' the state of neutrality is not, nor can be, a new state, but a continuation of a former one, by the Sovereign who has no wish to change it.' But neutrality has nothing whatever

[8] Cited, *Letters of Historicus*, p. 127. The quotation comes from Galiani, but is cited by Azuni with approval. He wonders how Galiani, having enunciated so sound a doctrine, could derive from it the unsound conclusions which he successfully combats.

to do with the individual, and all the puzzles which confuse the public mind arise from the fact that the word 'neutral' is applied indiscriminately to Governments and to individuals. The importance of appreciating this is manifest, for if it is unsound the German case, in which the contrary doctrine appears and reappears over and over again, is right; if it is sound that case tumbles to pieces. It is the persistence with which the German Foreign Office has dragged the opposite contention in by the heels on every possible occasion which makes it so necessary to insist on the recognition of this principle. The burden of its reply to the United States, the condition on which Germany will abandon its evil under-water practices, is that this principle should be given up, and the neutral trade in arms with its enemies declared illegal. If it could be thought for a moment that the United States was likely to be beguiled into abandoning it, then the peace of the world would indeed be in jeopardy. But, unfortunately for the Germans, the Americans know full well what the principle means, and the place it holds in the international system, for them to give even the slightest hint that this is possible.

What, then, does neutrality mean? That the Government of a non-belligerent State must do nothing to assist either belligerent, by providing him with arms, or ships, or men, or money. It is not difficult to understand why neutrality is not applicable to the individuals of the non-belligerent States. Nations subsist by international com-

merce, and there is no reason why, because two of them go to war, all their trade with the others should be declared illegal.[9] Therefore we get at once to this axiom, that war does not affect neutral trade with either belligerent, but the merchants in neutral countries are entitled to carry on business with them. And so the neutral merchant makes his first appearance on the scene.

Contraband of War

But to adopt the language of the day, *Krieg ist Krieg*; and if the neutral merchant has rights so also have the belligerents, and the doctrine of contraband of war gives expression to them, though few doctrines have been so loosely put into words. I think I am fairly stating the prevalent and mistaken opinion when I put it thus: that it is a breach of neutrality to trade

[9] See the quotation from Azuni, cited *Letters of Historicus*, pp. 126–131:—'Whatever may be the other demerits of Azuni's work, his doctrine on this point is unquestionably sound, and the reasons which he adduces are unimpeachably accurate—

' "Commerce in all kinds of merchandise, commodities, and articles of manufacture, being allowed in time of peace to the subjects of a nation, so far as the laws of the State, or particular treaties with other Powers create no exception, they ought to be permitted to do the same thing during the continuance of war, since neither of the belligerent parties has a right to impose any new obligations on the neutral, which did not exist in time of peace. * * * *

' "In the public treaties down to the present time, do we in fact see any prohibition than that of transportation of contraband goods to an enemy? No nation, not even the most powerful, or those who could, with impunity, exercise the right of the strongest, have ventured, in their declarations of war, dictated by the most violent animosity, to prohibit neutrals from the impartial sale of any goods in their own territory. They have confined themselves to the threat of confiscating contraband articles which should be found clearly destined to the enemy." '

in contraband, and that it is the duty of a neutral State to prevent its subjects from so trading. The Germans, in insisting on this popular idea, are juggling with the word 'neutrality,' and they do so in a way which is almost pathetic; yet their version of what they are pleased to call 'true neutrality' is so near to plausibleness that I must be at pains to elaborate the real principle. A belligerent has a perfect right to apply the maxim 'Who helps my enemy becomes my enemy' to the neutral merchant. But seeing that he is an unarmed civilian he cannot be made to fight. The remedy against him is therefore confiscation of his goods. The special way in which the merchant can help the enemy is by supplying him with munitions of war and other means of carrying on the fight. In order that there may be no mistake a more particular list of things which help the enemy is made out, called 'Contraband of War.' Now the belligerent has no right, much less any power, to prevent the merchant from selling these things to his enemy; but he gives him fair warning that if he sends them by sea cruisers will be on the look-out for his vessels, and they will be detained and searched and the contraband cargo seized. If the merchant turns to his Government and invokes its protection, talking about the 'freedom of the sea' and the 'common highway of the nations,' he will get for only answer, 'The threat is justified and I cannot help you. You are assisting the enemy and must take your chance. I cannot prevent you taking that chance, nor can I order you to forbear, for then I should

be interfering in favour of the other belligerent, and that would be a breach of neutrality on my part. All I can do for you is to see that you get fair play if you are caught, and proper damages if you are innocent.' So now we get to the law in its first shape: the neutral merchant is free to carry on his trade with either or both belligerents to any extent, in arms or in anything else; but if he trades in contraband of war he takes the risk of losing his cargo. The justification for the rule can be put in simplest language. The belligerent has obviously no right, merely because he is at war, to order neutral merchants not to carry contraband to the enemy, nor even to expect that they will not. Neither can he insist that the neutral merchant's Government should intervene on his behalf, and so commit a breach of neutrality towards the other belligerent.

Certain subsidiary questions arise at this point. First, the familiar distinction between absolute and conditional contraband. This follows in direct sequence from what has already been said. The belligerent is not fighting the civil population, but only the enemy Government and its forces. This compels him to interfere with neutral trade in everything that enables that Government to maintain its forces. But how to draw the line between things destined for the civil population and those destined for the forces, for things destined for the civilian may be serviceable to those forces, and may, in fact, be used by them.

The broad principle governing conditional con-

traband was stated by Lord Salisbury in the *dictum* as to foodstuffs already referred to.

This principle was adhered to by us during the early months of the War, and was expressly referred to as having guided our action in Sir Edward Grey's interim reply, of the 7th of January, to the American Note. But the War has revolutionised many ideas, and among them those which had led to the adoption of this principle by Great Britain in the face of the opposing contentions of other countries in the past, notably France and Germany. In his final reply to the Note, sent on the 10th of February, Sir Edward Grey frankly stated that 'in the absence of some certainty that the rule would be respected by both parties to this conflict, we feel great doubt whether it would be regarded as an established principle of international law.' Further, he pointed out certain new features in the circumstances in which the War was being waged which tended to show that an adherence to the old principle would be an unjustifiable restriction on our power of striking the enemy—(*i*) the existence of an elaborate machinery for the supply of foodstuffs for the use of the German army from overseas; (*ii*) the practical disappearance of the distinction between the civil population and the armed forces of Germany; (*iii*) the power taken by the German Government to requisition food for the use of the army, which rendered it probable that goods imported for civil use would be consumed by the army if military exigencies required it.

I confess that there are many considerations

which challenge the logic of the distinction between absolute and conditional contraband, and give it more the character of a humanitarian concession. It introduces a new bone of contention between belligerents and neutral traders, and it opens up the grave danger of concealed contraband in cargoes which are themselves innocent: the concealment of copper, for example, in bales of cotton. In view of the more rigorous rule of blockade where the distinction disappears, it seems more in the nature of a preliminary measure in the process of throttling the enemy; the first turn of the screw, and a suggestion of sterner measures which are in store.

It is important to note that the determination of what is contraband, what absolute and what conditional, is left to each belligerent. Seeing that no law is possible on the subject, that agreement has got no further than the unratified Declaration of London,[10] and that it could not be for the enemy to decide, there is no one but the belligerent left. But it rests on a better reason. Each belligerent is master of his own fray; he can direct the attack at his own discretion, and can strike his blows where he pleases; and if we bear in mind what he *could* do, the declaration that some things shall only be contraband if they are destined for the enemy's forces is clearly a reservation of strength rather than an expenditure

[10] I have not attempted to discuss the questions raised by the Order in Council of October 29, 1914, which put in force, during the hostilities, the Declaration of London, subject to exceptions and modifications.

of force. There is no rule which imposes half-measures on any belligerent; he may exert all his strength and destroy or seize all his enemy's property if he is able; the principle of blockade expressly provides for it; the only thing that is required of him is that, until he proceeds to extremes, he must be careful how he interferes with neutral property.

Another point requires explanation. Of course all enemy ships upon the seas are lawful prize. But it strikes one at once that here is a departure from the principle that you do not make war upon the civil population, for merchant ships are civilian property. The neutral merchant has, however, been looked after, for the Declaration of Paris has proclaimed that 'neutral goods, with the exception of contraband of war, are not liable to capture under enemy's flag.' But in the converse case, it would not seem reasonable that enemy property in neutral ships should escape capture. The Declaration of Paris, however, steps in with the arbitrary rule that 'the neutral flag covers enemy's goods, with the exception of contraband of war.' It cannot be said that this rule has done much to safeguard the 'freedom of the sea' for neutral vessels, for there is no doubt that guns consigned to Germany discovered on an American ship on a voyage from Galveston to Pernambuco would be lawfully seized; and as the guns may be seized the vessel may be detained and searched. But practical considerations work in favour of the neutral merchant. Not all the hosts of the Allied

Fleets would be sufficient for the stupendous work which would be involved in putting this right into practice; therefore good sense has decreed that the destination of a ship to an enemy port shall be adopted as the practical working factor in its application, at least in the case of conditional contraband. But this has engendered the idea, which certainly is no part of the rule in its naked simplicity, that neutral ships sailing to neutral ports can carry enemy cargoes of contraband with impunity. Enemy destination is supposed alone to afford a presumption that there is contraband for the enemy on board; but if there were any doubt that the idea is erroneous, the words 'whatever be their destination,' in a judgment of Lord Stowell's, to which I shall presently refer, must dispel it.

I have talked of the belligerent right of seizure. But civilised nations, recognising that in the most elementary statement of the case not all neutral cargoes even with an enemy destination are liable to seizure, have realised the necessity of establishing a tribunal by which this question of liability and consequent confiscation can be decided. With the right of some cargoes to escape there came into being at once the duty of withdrawing the decision from the summary process which the sailor would inevitably adopt. The question of liability might be a complicated one of fact: law might be involved: a Court was essential. But as to its constitution there were only three alternatives: enemy judges, obviously impossible;

neutral judges, or an international Court, not very practicable; there remained nothing but judges of the belligerent country. Hence the anomaly of the Prize Court sitting in the seizing country's territory, presided over by judges of that country. An anomaly, because it is contrary to the elementary rule that no man shall be a judge in his own cause; yet the judgment of a Prize Court is a judgment *in rem*; it passes property, and is accepted as binding against all the world by the Courts of all other countries. There have been in the past complaints of the decisions; sometimes they have been followed by diplomatic representations. But in these times when—I imagine for the first time in history—a civilised Government has been deliberately charged with having recourse to lying, it surely is a bright spot in the international horizon to think that the system of Prize Courts has produced judges who, as the world has recognised, have been among the greatest.

But the detention of neutral ships at sea, and the seizure of the contraband that they carry to the enemy, can be put much higher than a mere belligerent right; nor does it spring solely from the vindictive principle that the neutral aiding the enemy becomes an enemy; it is based on the supreme right of self-defence. It is the inevitable counterpoise to the right of the neutral merchant to continue trading, even in contraband, in spite of war. The importance of this trading right to the neutral merchant is the measure of the importance of this defensive right to the belligerent.

The right of the neutral merchant was put on the large commercial ground by Mr. Huskisson: 'Of what use would be our skill in building ships, manufacturing arms, and preparing instruments of war, if equally to sell them to all belligerents were a breach of neutrality?'[11] But it can be put on a still larger ground. Without it the small nations would go to the wall. If there were such a doctrine as Germany now contends for, a great country with unlimited resources could speedily annihilate all the weak nations one after the other. There is no such doctrine as that when war is declared the warring nations are to fight it out with their own resources only. It is not the duty of neutral merchants to keep the ring and let the best man win. Sentiment does not come into the question. The neutral merchant may serve that side which he earnestly desires should win; but the other belligerent has

[11] Cited, *Letters of Historicus*, pp. 133, 170:—'Mr. Huskisson, in the debate on the Terceira affair in 1830, cites the opinion of Mr. Canning to the following effect (*Hansard*, vol. xxiv., N.S., p. 209):—

'"Arms may leave this country as a matter of merchandise, and however strong the general inconvenience, the law cannot interfere to stop them. It is only when the elements of armaments are combined that they come within the provision of the law, and if that combination does not take place till they have left this country, we have no right to interfere with them." These are the words of Mr. Canning, who extended the doctrine to steam-vessels and yachts that might afterwards be converted into vessels of war, and they appeared quite consistent with the law of nations. At the very moment he was speaking, arms and clothing were about to be sent out of this country to belligerents. Were they to be stopped, or were they to be followed and brought back? He believed the answer would be, No; and if it were Yes, of what use, he would ask, would be our skill in building ships, manufacturing arms, and preparing instruments of war, if equally to sell them to all belligerents were a breach of neutrality?'

The speech is cited at greater length on p. 170.

the extreme penalty of confiscation in his hands, and sentiment must inevitably fade into the background.

The conclusion of the whole matter is that the two great war doctrines are, the right of the neutral merchant to trade in contraband, and the right of the belligerent nations to seize his cargoes. Combined, they make the simple principle that the neutral merchant may supply contraband to either side subject only to the risk of seizure by the other. 'The right of the neutral to transport,' says Kent, 'and of the hostile Power to seize, are conflicting rights, and neither party can charge the other with a criminal act.' [12]

The Right and the Duty of Search

But the principle of seizure is still in a very crude state; and seeing that all cargoes destined for the enemy are not liable to seizure, and that for practical reasons it is neither possible nor advisable to bring in every cargo for adjudication in the Prize Courts, a supplementary right has

[12] Cited, *Letters of Historicus*, p. 129:—'It is a general understanding, grounded on true principles, that the Powers at war may seize and confiscate all contraband goods, without any complaint on the part of the neutral merchant, and without any imputation of a breach of neutrality in the neutral Sovereign himself. It was contended on the part of the French nation, in 1796, that neutral Governments were bound to restrain their subjects from selling or exporting articles contraband of war to the belligerent Powers. But it was successfully shown, on the part of the United States, that neutrals may lawfully sell, at home, to a belligerent purchaser, or carry themselves to the belligerent Powers, contraband articles, subject to the right of seizure *in transitu*. This right has since been explicitly declared by the judicial authorities of this country. The right of the neutral to transport, and of the hostile Power to seize, are conflicting rights, and neither party can charge the other with a criminal act.' (*Commentaries*, vol. i., p. 142.)

been devised, known as the 'right of search.' It is the first step in the seizure, and, on the one hand, affords the belligerent an opportunity of letting non-contraband cargo go free; on the other hand, it gives the owner of the cargo an immediate opportunity of proving its innocent character. The right of search is often stated as an independent right, but it is in reality secondary to the right of seizure, and references to it obviously apply equally to the right of seizure. As to its unlimited nature I need do no more than quote the well-known words of Lord Stowell in the case of the Swedish convoy.[13] It is incontrovertible

> that the right of visiting and searching merchant ships upon the high seas, whatever be the ships, whatever be the cargoes, whatever be their destination, is an incontestable right of the lawfully commissioned cruisers of a belligerent nation. . . . This right is so clear in principle that no man can deny it who admits the legality of maritime capture, because if you are not at liberty to ascertain by sufficient inquiry whether there is property that can be captured, it is impossible to capture.'

On this another rule has been grafted which is suggested by the enunciation of the law as to the right of search. That right *must* be exercised for the very same reason that the right has been allowed, for otherwise you do not know whether you have the right to seize. From the *right of search* has therefore developed the *duty to search*; and it is the omission to recognise this duty that has plunged the German Admiralty into its piratical career.

[13] Cited, *Letters of Historicus*, p. 177.

The Doctrine of Continuous Voyages

But the heart of the neutral merchant is desperately ingenious, especially when his country is contiguous to the theatre of war, and no sooner had he obtained the inch to which practical considerations made him appear to be entitled than he developed it into an ell of his own imagining. He argued thus: A neutral vessel bound to an enemy port is liable to detention, because the presumption is that she has cargo for the enemy, and that her cargo is probably contraband; the presumption also is that cargoes on board a vessel bound for a neutral port are not destined for the enemy, even though they may be contraband; nothing easier than to bring them across the sea in a neutral vessel with a neutral destination; all that remains to be done is to pass them on to the belligerent, either transhipping them into another vessel and sending it down the coast, out of the way of the attentions of the enemy's cruisers, or better still, if the neutral and belligerent countries are contiguous, by rail across the border. And the best of the plan is that the shipper on the other side of the water, say some innocent merchant in copper in the United States, need know nothing about it, so that if by chance the cargo does get seized he will do all the shouting.

With this problem, devised in some such human fashion, the United States was faced during the Civil War, and the Judges settled it in characteristic and logical manner. They discovered the doctrine of 'continuous voyages.' It is nothing

more than the simple application of elementary principles, and is arrived at by the elimination of the presumption of innocence which the voyage to the neutral port raised. All presumptions may be rebutted, and this one manifestly. 'Be the destination what it may,' the right of search existed; the presumption had only been allowed to grow because it was convenient. If goods destined for the enemy reached him by way of a neutral port, that port was only an intermediate destination; the ultimate consignee was the enemy, and there was a continuous voyage to him from the port of shipment. Therefore the seizure, and therefore the search, were justified, and could not be denied merely because 'the final destination of the cargo was left so skilfully open.'

But the neutral merchant's wits are sharpened by much profit in prospect; he is no simpleton, and a consignment of, let us say, copper from the United States is not likely to be addressed 'Herr Krupp von Bohlen, Essen, *viâ* Rotterdam, by kind favour of Messrs. Petersen & Co.' Hence a most ingenious argument conducted on the principle 'You shut your eyes, I'll keep mine open.' A consignment 'to order' (as 'to the order of Messrs. Petersen & Co.') may perhaps be legitimately seized, because the words do not clearly indicate the Dutch firm to be the real purchasers; but certainly not a consignment to a specific person (as to Messrs. Petersen & Co., Rotterdam). The sophistry is obvious; it does not negative the possibility that Messrs.

Petersen & Co. are either acting as buyers for, or have imported the goods with the intention of passing them on to, Herr Krupp of Essen. And with the help of trade statistics the possibility may be discovered to be a probability.

Embargo

And now the pendulum swings back, and in the doctrine of embargo the really neutral merchant comes into his own. 'Embargo' is the action taken by a neutral Government in regard to goods which have been declared to be contraband by one or other of the belligerents; and the point to be emphasised is that it springs directly out of the doctrine of 'continuous voyages.' In order to prevent neutral ships destined to its ports with goods which one of the belligerents treats as contraband being detained and searched at sea, it prohibits the export of those goods from its own ports. The embargo satisfies the belligerent that these goods will not go out of the neutral country, and therefore will not get directly or indirectly into the hands of the enemy; he therefore feels justified in letting those ships go free, for the doctrine of 'continuous voyages' cannot apply. Now the reason for the embargo is that the merchants of the neutral country require the commodity for themselves. Suppose, for example, that Spanish merchants require copper for their own use; then in order to ensure cargoes of copper coming direct to Spanish ports without being interfered with at sea by the search of belligerent cruisers,

the Spanish Government might put an embargo on copper: that is to say, might prohibit its export. There could be no better evidence that the Spanish merchants were importing the copper for their own trade, and that none of it would get through to the enemy. I can therefore best describe an embargo thus: It is action taken by a neutral Government to protect those of its merchants who do not desire to engage in trade in contraband from the consequences which would result from the action of those who do.

There is only one point in connexion with this doctrine which requires attention. Is the action thus taken by the neutral Government a breach of its neutrality to the other belligerent? For, undoubtedly, it does act favourably to the belligerent who has declared the goods to be contraband. The answer is simple. Once admit the strict logic of the doctrine of 'continuous voyages,' it follows that an embargo is a measure neither directed against one belligerent nor imposed to favour the other. It is simply a measure of self-defence, taken in order to prevent the national industries from suffering from the undoubted belligerent right of detention at sea and possible seizure.

There are other occasions in which an embargo may be resorted to, as in the case of the embargo on rubber imported by Great Britain to which reference has been made above.[14] That is purely a municipal question with which international law can have no concern.

[14] See p. 17.

Blockade

And now I come to the last point of all, blockade, which is the supreme manifestation of force at sea for the purpose of crushing the enemy. Here all minor considerations vanish. The artificial distinction between absolute and conditional contraband disappears; there is no longer any free list; neutral as well as enemy cargoes are subject to seizure, whether going to or coming from the blockaded port. The humanitarian concession that war is not made on the civil population finds no place; indeed, blockade derives much of its efficacy from the pressure which the strangling process brings to bear on that population. It has been described as a siege carried on at sea, but under somewhat more elastic conditions than a land siege. It is a convenient comparison, because all the outcry against its inhumanity is silenced by the recollection of Paris in 1870, and the vision of what Paris would have been in 1914 if the German plan had succeeded. It is rigorous, almost brutal, but it is war, and war admits of no half-measures which come within the code of civilisation; and this measure, extreme though it be, has long been recognised as legitimate warfare. Nor is there any conventional limitation as to the time when it may be resorted to. Coming as it naturally does at the end of the discussion to which other principles have led up, it might appear as if custom had decreed that it should only be resorted to after all other measures had failed. But there is nothing to prevent a war starting with a blockade; nothing,

that is to say, in the theory of the subject, though there are any number of practical reasons which make it improbable. I presume, however, that if a great maritime Power were at war with a State which had only a miniature fleet, a blockade of its coasts would be the speediest and, therefore, the most humane way of bringing it to a conclusion. Certainly there is no rule or custom which prevents a Power at war from putting forth its full strength at once.

The ascending scale is easier for purposes of study; the mind grasps smaller things more easily, and they prepare the way for the appreciation of the greater things. But it is not by a process of logical development that we reach blockade after a study of contraband. Blockade is treated last more conveniently because it involves the greatest development of force against the enemy; but it would have been more logical to have begun at the other end of the scale, starting with the greatest exhibition of force, and letting the series of rules emerge in diminishing strength. In view of what remains to be said, it is of great importance to appreciate that the incarnation of sea-power, blockade, which cuts the enemy off absolutely from the outer world, lies at one end of the scale of what one belligerent may do to the other, and the seizure of contraband on a neutral ship going to an enemy port, which cuts the enemy off but partially, lies at the other end. There can then be no difficulty in justifying what comes in between.

But the most curious point is that it is only

when we come to the recognition of this extreme manifestation of force that we meet with artificial rules. A blockade must be 'effective.' Yet this word, as to the meaning of which in its ordinary use there can be no doubt, is given in treaties and by the authorities a wholly artificial meaning. Sometimes it includes the exact contrary to effectiveness, as that 'A blockade is not regarded as raised if the blockading force is temporarily withdrawn on account of stress of weather'[15]: during which the adventurous skipper may run in. It is not necessary to labour the point; but it is necessary, when measures short of 'blockade' have been taken by England, that the full extent of what blockade pressure upon neutral trade means should be understood.

In order to determine what characterises a blockaded port, that denomination is given only where there is, by the disposition of the Power which attacks it with ships, stationary or sufficiently near, an evident danger in entering.[16]

A blockade [by cruising squadrons allotted to that service, and duly competent to its execution] is valid and legitimate, although there be no design to attack or reduce by force the port or arsenal to which it is applied, and that the fact of the blockade, with due notice given to neutral Powers, shall affect not only vessels actually intercepted in the attempt to enter the blockaded port, but those also which shall be elsewhere met with and shall be found to have been destined to such port, with knowledge of the fact and notice of the blockade.[17]

[16] Article 4 of the Declaration of London, which stated accurately the established doctrine.

[15] From the Convention of 1901 between England and Russia, cited *Letters of Historicus*, p. 92.

[17] From a speech of Lord Grenville, cited *Letters of Historicus*, p. 108.

These two quotations embody the principles of the English prize law. Article 17 of the Declaration of London contains a modification of them, and provides that 'neutral vessels may not be captured for breach of blockade except within the area of operations of the war-ships detailed to render the blockade effective.'

I have come to the threshold of a subject of gravest importance, the new policy of the British Government adopted in answer to the 'war-zone' declaration of Germany, and I stop. To devote to it merely the end of an already long article would not be treating it with the consideration which it deserves, and which the question demands. Moreover, it would not be expedient for an ex-official Englishman to discuss the subject controversially at present. It is sufficient that the measure has been adopted after full and mature consideration by the Government, that the question is political as well as legal, and for us it must be taken to be within the legitimate powers of a belligerent. Presently, to judge from what has already happened, there certainly will be any amount of nonsense talked and written about it; already the term 'paper-blockade' has come in handily for the making of a paragraph, and some bold spirit has hit upon a brand-new term, 'long-distance blockade.' Also there has been some not very wise talk about 'Two wrongs not making a right.' I would suggest to those who feel irresistibly impelled to discuss the question that they should omit the word 'blockade,' for, as we have seen, it

is a pernicketty term, and all sorts of legal niceties spring up in its train. I have endeavoured to show that 'blockade' is the extreme manifestation of the force known as sea-power against the enemy, that sea-power lies at the root of the authority which has been given to the series of principles governing belligerent interference with neutral trade, and that these principles are not a mere adventitious set of rules drawn up at odd times as wars at sea occasioned them. The principles and the rules have resulted from the play of natural forces, exerted by the belligerents on the one side, by the neutral merchant on the other. The rules are not even a compromise. The clash of forces has thrown off alternating sparks, rules recognising now the right of the one, now the right of the other. But in the supreme display of sea-power known as 'blockade' we find that the right of the belligerent does, as is inevitable, take the upper hand, and the right of the neutral disappears. And there are two French maxims worthy of note just now: '*Qui veut les fins veut les moyens*,' and '*Qui peut plus peut moins*.'

P.S.—I must briefly refer to two questions which appear at first sight to conflict with the principles advanced in this article—Foreign Enlistment, and the King's Proclamations of Neutrality.

Before agreeing with the United States as to the 'Three Rules' which, as I have pointed out,[18]

[18] On p. 2.

deal solely with 'foreign enlistment,' the British Government declared that they could not assent to the contention that those rules were a statement of principles of international law in force at the time when the *Alabama* claims arose. This is expressly stated in Article 6 of the Treaty of Washington. 'Historicus,' in one of his Letters,[19] cites some American authorities which bear out this view. Further, he explains the true inwardness of the Foreign Enlistment Act :—

> The Enlistment Act is directed, not against the *animus vendendi*, but against the *animus belligerendi*.
>
> It prohibits warlike enterprise, but it does not interfere with commercial adventure. A subject of the Crown may sell a ship of war, as he may sell a musket, to either belligerent with impunity; nay, he may even despatch it for sale to the belligerent port. But he may not take part in the overt act of making war upon a people with whom his Sovereign is at peace. The purview of the Foreign Enlistment Act is to prohibit a breach of allegiance on the part of the subject against his own Sovereign, not to prevent transactions in contraband with the belligerent. Its object is to prohibit private war, and not to restrain private commerce.

It is only when it has become the subject of agreement between two or more States that 'foreign enlistment' assumes an international as well as a municipal character. I presume that this municipal character has not been lost by the inclusion of the duty to prevent the fitting out or arming of vessels in Article 8 of the Hague Convention, No. 13, of 1907, relating to the duties of Neutral Powers in Maritime War.

[19] *Letters of Historicus*, pp. 165, 168.

As to the Proclamations of Neutrality, so much as recites and reinforces the Foreign Enlistment Act need not trouble us; the King's loving subjects are exhorted to comply therewith. The rest of the Proclamations amounts to no more than a warning to subjects not to do 'any acts in derogation of their duty as subjects of a neutral Power in a war between other Powers, or in violation or contravention of the law of nations in that behalf'; but, as 'Historicus' says,[20] 'The nature of the penalty is pointed out with equal clearness and correctness—*viz.* the withdrawal of the King's protection from the contraband on its road to the enemy, and an abandonment of the subject to the operation of belligerent rights.' What those belligerent rights are I have endeavoured to explain.

[20] *Letters of Historicus*, p. 132:—The following paragraph follows the quotation cited in the text:—

'The true doctrine is enforced with singular clearness and force by President Pierce, in his Message of December, 1854:—

"The laws of the United States do not forbid their citizens to sell to either of the belligerent Powers articles contraband of war, or to take munitions of war or soldiers on board their private ships for transportation; and although in so doing the individual citizen exposes his property to some of the hazards of war, his acts do not involve any breach of national neutrality, nor of themselves implicate the Government. Thus, during the progress of the present war in Europe, our citizens have, without national responsibility, therefore, sold gunpowder and arms to all buyers, regardless of the destination of those articles. Our merchantmen have been, and still continue to be, largely employed by Great Britain and France in transporting troops, provisions, and munitions of war, to the principal seat of military operations, and in bringing home the sick and wounded soldiers; but such use of our mercantile marine is not interdicted, either by international or by our municipal law, and, therefore, does not compromise our neutral relations with Russia."'

II

THE NEUTRAL MERCHANT AND THE 'FREEDOM OF THE SEA'

[*August* 1915]

The American Notes to Germany—The Protest to Great Britain against the Order in Council—Mr. Norman Angell's Plan for the Neutralization of the Sea—His Threat of War with the United States—German Idea of a 'Free Sea'—General View of the Main Provision of the Order in Council—Application of the Law of Vendor and Purchaser: Contracts F.O.B.—Declaration of Paris: Free Ships make Free Goods—A Suggested Solution of all Difficulties—Effect of the Order in Council—American Acquiescence in a 'Long-Distance Blockade'—Relation between Contraband of War and Blockade—Sovereignty over Neutral Ships—Withdrawal of National Protection from Ships carrying Contraband of War—Right of Search no Infringement of National Jurisdiction—Doctrine of 'Continuous Voyages' and the Order in Council—Reprisals—The Orders in Council of 1807—The American *caveat*—Criticism of Note in the 'North American Review'—Continuing Contracts entered into before the War.

THE quality of diplomatic courtesy between the United States and Germany is much strained, for the submarine pirates have sunk American ships, and have drowned American citizens bound on their lawful errands on British ships. On the 14th of May, Germany was informed for the second time that she would be held to strict accountability for any infringement of the rights of American citizens, whether intentional or accidental, and in her methods of attack against the trade of her enemies she was called on no longer to disregard

'those rules of fairness, reason, justice, and humanity, which all modern opinion regards as imperative.' On the 11th of June, the defence that the *Lusitania* was carrying contraband was brushed aside as irrelevant to the question of the legality of those methods. The German reply being evasive and justificatory, on the 23rd of July a third warning was given: if the offence should continue unabated the action would be treated as 'deliberately unfriendly.' These Notes derive their dignity from their obvious restraint, from the measured insistence of their words, and from the scrupulous exactitude in the statement of the principles they appeal to. No saner judgment was ever pronounced against a criminal, and, though a golden bridge has been offered for retreat, they will stand against Germany as a permanent record of her iniquity.

But a curiously paradoxical situation arises with regard to ourselves. The very virtue of these Notes is bound to react to our prejudice; for other neutrals may too readily assume that those same high qualities are also to be found in the Note of the 30th of March, protesting against the British Order in Council issued as a reply to the German submarine attacks on merchant shipping in the 'war-zone.' There is also a minute minority of our own people who have a perverse habit of thinking that 'after all' we *may* be wrong, and they will not fail to apply their favourite doctrine in this case.

In the aftermath of the War, far-off though it be, we can already see one question which will be insistent for solution: what effect will it have

had on international law? It is essential, if England is to preserve her high place in the councils of the nations, that the sincerity of her words should not be open to question through any act which could be brought up against her of even doubtful legality. This Protest alleges that there is no doubt as to the illegality of our so-called blockade of Germany. With profound respect, I believe the Protest to be unsound in its premises and inaccurate in its conclusions, and that there is as complete an answer to it as to the previous Notes addressed by the United States Government to this country. But it has put a weapon into the hands of our enemy of which he has not been slow to avail himself; it has given Herr Dernburg a plank to dance on instead of a slack-rope; it has played upon the imagination of Mr. Norman Angell, who has been for so long engaged in shattering the illusions of others, and provided him with an illusion all his own. In the May number of the *North American Review* he has caught some ideas hitherto floating in the air and shaped them into a new peace-theory which he believes will be acceptable to the American Government, and I presume, to other countries also. He has given it for title 'The Neutralization of the Sea.'

Mr. Norman Angell's Plan for the Neutralization of the Sea

Mr. Norman Angell is a serious writer. He has detected the weak points in what is called the 'arbitrament of war,' and has formulated his indictment against it in a series of concrete pro-

positions. The wilderness of the world's foolishness so re-echoed with his words that some thought they saw the wild rose blossoming. Yet, though the wilderness still breeds the thistle, his theories rested on a substratum of fact, and set people thinking when he first spoke to them. But his last excursion into the regions of the Unattainable has no such merit; he has been busy dreaming other men's dreams. He foresees this contingency, which 'English opinion has absolutely failed to envisage,' that at the conclusion of the War America will see to it that 'sea-law as it stands, and as America has accepted it,' is 'changed altogether.' He says that 'there is in England not the faintest realisation that the inevitable outcome of the present contraband and blockade difficulties will be an irresistible movement in America, for the neutralization of the high seas, or, failing that, their domination by the American Navy.' So much of this as relates to England is perfectly true; there has not been 'a line of discussion concerning it in the Press,' for the all-sufficient reason that it is the 'very coinage' of Mr. Norman Angell's brain, the 'bodiless creation' of his ecstasy. That 'profound conflict of policy' which, after unnumbered years, is to end in the transfer of the command of the sea across the Atlantic is not 'even being discussed in England'; and it is therefore consoling to know that 'it is probable that very many Americans themselves do not realise clearly how this dispute is developing, and how the United States will be pushed to take a stand for a profound alteration of the entire

maritime situation.' With this the phantasy of the 'neutralization of the sea' might be dismissed. It is a dangerous topic to discuss at this time, especially in America, with so uncertain a knowledge of 'sea-law' as Mr. Norman Angell displays; for others besides pacifist doctrinaires are making great play with it to the same audience —to wit, our enemies. Yet this advocate of peace threatens us with war if we will not accept his great illusion—war with the United States! And in order to avoid this conflict, 'which certainly no one who wishes well to the two countries would care to contemplate,' he demands the sacrifice of every principle on which we found our belief that Right must ultimately become Might. I can only assume that he does not see that the result would be the greater prevalence of the German doctrine that Might is Supreme.

We were once interested by Mr. Norman Angell's studies in the 'might have been': were even ready to agree that as 'might be' they were worthy of serious consideration. But, frankly, his countrymen have no wish that England should be the *corpus vile* on which this new experiment is to be tried. The Platitudinarians rejoiced when he came over to them; but Mr. Norman Angell is too serious a student for such company. Let him then, as other Englishmen who have attacked England have done, recant; I will find him excellent reason. He is not too familiar with the subject on which he has now laid profane hands. He has been struck with the glint of a phrase, but I am sure he does not know what

the 'neutralization of the sea' really means. It means, first, that the high sea is to be forbidden to men-of-war of any nation whatsoever; secondly, that the high sea shall not be used by neutrals for war purposes—that is, for supplying belligerents with munitions of war: alternatively, that they should supply each belligerent alike without interference from the other; thirdly, that their trade in non-contraband should go on as if there were no war.

The 'neutralization of the sea' is therefore a convenient formula which may be substituted for that occult paragraph of the German reply to the American Note of the 12th of February, the meaning of which I have endeavoured to give in my first article: that little lecture to the American trader on the subject of 'the practice of right,' and 'the toleration of wrong.'[1]

The paraphrase of this new formula is more easy. First: wars shall cease upon the high seas; and as 'men-of-war' obviously include transports, wars will thenceforward be confined to continents; bellicose islands will never again be allowed to participate. Permanent peace will thus be established in part of the world; and for the rest, seeing that you cannot expect to achieve everything at once, there must be just one more war, in which Germany will reduce Russia to impotence, absorb the small States, and crush France and Italy without the interference of troublesome over-sea soldiers; after which the beatific vision of a permanent Teutonic peace.

[1] See p. 13.

Secondly: with regard to so much of the formula as relates to neutrals, the justice of it must become apparent if you introduce as a prelude the tearful appeal so often heard of late from Berlin—'You pray for peace, and yet you arm our enemies to fight.' It is unkind to substitute for this—'You will not let us crush our enemies in our own way'; yet it is its exact equivalent; and reduced to a practical proposition it means this, that when nations go to war they must fight with their own resources, which not even the dreamiest of the Pacifists would assent to, for then those little nations, in whose prosperity Mr. Norman Angell so much believes,[2] would go to the wall. It would give the strong States the power to crush them, picking their quarrel when and how they will. But if you will not agree to this so-simple proposition, then, for goodness' as well as for profit's sake, be logical and trade with both belligerents alike; do not let yourselves 'be influenced in the direction of conscious wilful restriction' by so trivial a matter as the 'command of the sea.' Sea-power on which it rests must be abolished altogether, which would be a great step towards permanent peace.

With the bearing of the 'command of the sea' upon the third phrase of its 'neutralization' this article specially concerns itself.

All this and more lies between the extremes of Mr. Norman Angell's threat; either this, or the United States will take the command of the

[2] The financial stability of the smaller States holds a very prominent position in the argument of *The Great Illusion.*

sea into its own hands. One may reasonably doubt whether this view commends itself to President Wilson; whether it has even entered the minds of the 'influential backers' of the demand for an enormously increased American fleet. Yet, if I may say it with profound respect, it is only another manifestation of the fundamental misunderstanding of the law of war which characterises the Protest itself.

Whether it be possible for the same end to be achieved by different means, the one lawful, the other unlawful, is a problem in casuistry which I shall not attempt to solve; but as a rough-and-ready rule of practical life we may take it that when two people seek to achieve equal ends they are equal to one another. Now the offensive Herr Dernburg—I use the term in no offensive sense, for I would not exclude myself from his Kirkwall compliment[3]—desires to forbid the sea to English cruisers in order that American vessels may not be let or hindered when they carry harmless 'raw material' to German ports. He asserts that any domination exercised beyond territorial waters which interferes with them 'is a breach and an infringement of the rights of others.' The *Emden's* raids on our commerce, carefully prepared and charted, 'if my gossip Report be an honest woman of her word,' two years before the War, are sufficient to show that this new opinion has sprung from the emergencies of the

[3] That his enemies were at least 'gentlemen': an opinion expressed in consequence of the courteous treatment he received at Kirkwall on his journey home under safe-conduct.

present moment. And the unoffensive Mr. Norman Angell also desires that the English cruisers should cease their vigil, in order that American vessels may help to complete 'vast commercial arrangements' entered into by some 'Chicago or New York magnate' with the German Government.

Applying then my rough-and-ready rule, Mr. Norman Angell and Herr Dernburg, desiring to achieve the same end, cannot be on opposite sides of the fray. Mr. Norman Angell has been beguiled by the sad picture which the Germans have drawn of starving Germany. Starvation, alas! is one of the weapons of war. The Germans have made full use of it in the past; and had their plans not miscarried Paris would again have lived on the vermin of the sewers, as it did in 1870. Mr. Norman Angell's memory does not run to that period; but he lives in a time when what he conceives to be the possible result of British war policy has become the actual policy of the invader of Belgium: almost a whole nation 'reduced to absolute starvation, including the women and the children,' by the direct action of the German Government in preventing the distribution of American food. His vision is clouded by the pathos of imaginary pictures; he does not see what is going on before his eyes, and he allows himself to be blinded to the real object of all the German manœuvring diplomacy, to which the 'Foodstuffs' cry is but a convenient screen. An embargo on the export of munitions of war from the United States to the Allies Germany will secure if she can, by hook or crook, by fair

means or foul, by argument or threat, by cajolery or intimidation, for necessity is driving her. Her one hope of salvation lies in getting the United States to break its neutrality, and the accomplishment of this ignoble task has been confided to the Bernstorffs, the Dernburgs, the Ballins, κ.τ.λ. These passionately exhort the Government of the States to control by domestic legislation its merchants' commerce with the Allies, because the British Fleet in its right of war is controlling their commerce with Germany. The German Admiralty has substituted piracy for war on the sea; and now, powerless to enforce its war right, it struggles to achieve the same results by the devious process of an American embargo. To enforce their rights of war nations sacrifice the lives of men; Germany to make good her lost rights is willing to sacrifice a friendly State. In furtherance of this, unconsciously I feel sure, Mr. Norman Angell has lent his facile pen, and he threatens us with war with the United States unless we forgo the benefits which the command of the sea has given us. If it were possible to imagine President Wilson to acquiesce by so much as the movement of his little finger, granting to Germany any fraction of the indirect help she so urgently needs, then indeed clouds would gather on the horizon—there is no half-way house between neutrality and alliance with the enemy.[4] But we may

[4] The real issue *must* be understood, or we shall find ourselves in a blind alley. The case *must* be put as strongly as I have put it. The Washington correspondent of *The Times*, writing on July 19, full of

rest assured there is no such possibility. Before, therefore, Mr. Norman Angell further develops his theory I would commend to his study those mighty disputations concerning the 'freedom of the sea' which were held twenty years ago between the United States and Great Britain, *quorum pars parvula fui. We* knew what we were quarrelling about. But Germany! She tells the unlistening world that she is fighting for 'the traditional *mare liberum*'! What can this *parvenu* of the high seas know of its traditions? And for the delectation of pacifist ears this programme has been arranged: 'a free sea,' which shall mean 'the cessation of the danger of war and the stopping of world-wars,' and 'the sending of troops and war machines into the territory of others or into neutralized ports' is to be 'declared a *casus belli*.' [5]

anxious solicitude at the gravity of the situation, assuming us to misunderstand it, said: 'It is all very well to trust to the President's sense of fairness to prevent the closing of American sources of supply of munitions of war. We can surely do so with perfect safety.' In the prevalence of this view of the case lies the gravest danger. Once admit that 'fairness' has in any shape or form anything to do with the matter, we open the flood-gates of Teuton eloquence, and, to use the conventional expression, the President must be a strong man to resist it. The question must be looked at from a higher standpoint; and it cannot be put more strongly or tersely than it was by Mr. Bryan in his letter to Mr. Stone in January: 'It is the business of belligerent operations on the high seas, not the duty of a neutral, to prevent contraband from reaching the enemy. . . . If Germany and Austria-Hungary cannot import contraband from this country it is not because of that fact the duty of the United States to close its markets to the Allies.'

[5] *The Times* correspondent from New York, on January 11, thus recorded an extract from Herr Dernburg's speech at a Republican club in America.

An enlightening and interesting commentary on the sincerity of the German diatribes against the United States for 'helping Germany's enemies' is furnished by the fact that, during the rebellion in China in 1913, the rebels in the Southern Provinces obtained large supplies of arms from

From which it appears that the proposed remedy will hardly cure the disease.

'It is with no mere idle use of high-sounding phrase that Great Britain once more appears to vindicate the freedom of the sea.' Thus we spoke in the argument in the Behring Sea Arbitration. And we may continue so to speak with clearest conscience; for a careful scrutiny will show that the principle of the Order in Council is new, if you will, but in legitimate sequence from well-established doctrines, and has sprung from them in an ordered and scientific development. Of the American Protest which criticises it, speaking with all due respect for the learned authors of it, it is, I venture to think, open on its destructive side to this general remark: that it enunciates old doctrines in their popular form without that full examination of the underlying principles which the grave state of the world's affairs demands. On its constructive side, however, it is interesting and worthy of careful study.

General View of the Main Provision of the Order in Council

Let us get at once a clear view of the position. England by this Order has aimed a very vigorous blow at the heart of her enemy, but the Govern-

German firms in Shanghai. The German Government took no steps to prevent its subjects 'helping the enemies' of the Republic; on the contrary, it joined, so it was reported, in protesting against the Chinese Government exercising in self-defence its undoubted right of search and seizure of cargoes of arms which it knew were being smuggled into the Settlement in order to be handed over to the agents of the rebel leaders. Circumstances alter cases.

ment of the United States has warned her that she may not do it, not from any humanitarian considerations, but because it would react to the detriment of neutral merchants. It points out that there are some principles of international law, some documents or declarations, which stand in our way. If this be really so, then international law sets the profit of the merchant above the life of nations. The theory of the United States appears to be that the conduct of war is to be governed by the interests of commerce, even if they touch those of the belligerents. The truer theory is, I believe, that commerce, in so far as it touches the interests of the belligerents, is entirely subordinated to the exigencies of war. If the view of the United States is right, then the documents and the declarations have been heedlessly signed and made, and the power of England upon the seas has been recklessly frittered away.

I have endeavoured in the first article to get into sharper relief than popular notions give to it the position in which the neutral merchant stands to a belligerent and to his own Government, and also to recall the real meaning of neutrality. The Order in Council had at that time been issued, but the American Protest had not been delivered. I intimated, however, that it seemed probable that a close examination of fundamental principles would show that the Order was abundantly justified by them. The publication of the Protest confirms me in that view.

And, first, I venture to contest the main doctrines on which the criticism of the Order

rests.[6] I deny that a belligerent nation has been *conceded* 'the right of visit and search, and the right of capture and condemnation' of neutral ships engaged in unneutral service or carrying contraband for the enemy. I deny that a belligerent nation has been *conceded* 'the right to establish and maintain a blockade of an enemy's ports and coasts and to capture and condemn any vessel taken in trying to break the blockade.' On the contrary, I assert that these are *belligerent rights* which may be *asserted* and exercised against the neutral merchant whose vessels are engaged in rendering those services to the enemy: that consequently 'a nation's sovereignty over its own ships and citizens under its own flag on the high seas' does suffer 'diminution in times of war' to the full extent to which a belligerent exercises those rights: and that to this extent 'the equality of sovereignty on the high seas' finds no place in war. And I further contend that the proposition, to the establishment of which all the argument of the Protest tends—that 'innocent shipments may be freely transported to and from the United States through neutral countries to belligerents' territory' without risk of seizure and confiscation—is not true when one of the belligerent Governments has declared its intention of stopping all shipments, and has taken effective steps to enforce that intention. If the proposition were true in these circumstances the Order in Council would be a breach of international law.

[6] The paragraph of the Protest which is here criticised is set out at length on p. 81.

Application of the Law of Vendor and Purchaser

Before making good this position a preliminary point raised by the Protest must be dealt with—the bearing of the Declaration of Paris on the question. Even the learned must have been somewhat confused by the isolated, almost casual, reference to one of its rules—'Free ships make free goods'; or to be more accurate, 'The neutral flag covers enemy's goods, with the exception of contraband of war.' Its relation to the context is more than obscure, for this rule applies to the seizure of *enemy property*, whereas the doctrines on which the law of contraband and the law of blockade rest apply to the seizure of *neutral property*. It is clear, therefore, that there are two very distinct planes of thought, and we cannot step lightly from one to the other without putting in peril the logical structure of the discussion.

'The rules of the Declaration of Paris of 1856, among them that free ships make free goods, will hardly at this day be disputed by the signatories of that solemn agreement.'

Thus, and no more, the Protest. The United States is not a signatory to the Declaration, and its final clause provides that it 'is not and shall not be binding, except between those Powers who have acceded, or shall accede to it.' But let us put this technical objection on one side and, admitting the rule to be a generally accepted principle, see what it has to do with the question in dispute.

The merchant promotes his trade with foreign

parts by many ways, but he never loses sight of one essential: payment for his goods. It is true that credit is the life of commerce; but during war conditions are changed, and while it may be that some still adhere to peace-time customs, the 'rumble of the distant drum' induces others, probably the more numerous, certainly the wiser, to 'take the cash and let the credit go.' On the other hand, the purchaser's object is to get the goods, more especially if he is a belligerent and the goods munitions of war: and one very sure way of obtaining possession of the document of title to them is by paying cash or by giving some substitute which the vendor accepts as its equivalent. Thus cash enables the wishes of both parties to be satisfied; and the law facilitates the acquisition of property after a sale by means of the contract for delivery of goods 'f.o.b.,' free on board, under which the property passes to the purchaser from the moment the goods are on board ship. Now it is obvious that if the neutral merchant is wise in his generation he will, having in view the risks ahead of him, secure payment for his goods and get rid of them 'f.o.b.' Then all those troublesome questions of seizure by belligerent cruisers and condemnation by Prize Courts concern *him* no longer. The goods become enemy cargoes consigned to one of the belligerents, the vendor has got his money, and they may go to the bottom of the deep blue sea, or into the factories of the other belligerent, for all he cares.

Here then is the puzzle. Seeing that the law

makes such ample provision for his protection, allows him to trade in such fashion that he can with safety and profit get rid of his troublesome property in cargoes when he has shipped them, even in cargoes of contraband of war, what is the meaning of all this talk about the violation of the rights of the neutral merchant upon the high seas? They have vanished; and even the ingenuous protests against the too strenuous application of the doctrine of 'continuous voyages' lose much of their pathos when we realise that the cargoes (of, say, cotton, copper, rubber, or even foodstuffs) seized on their way to neutral ports may not be, need not be if he has exercised reasonable care, the neutral vendor's property at all. They ought to be enemy property, or at best the property of purchasers in 'countries which, though neutral, are contiguous to the nations at war'; and then the plaint should come from this side of the Atlantic. The whole question has now taken a different aspect, and the presumption, based on overwhelming statistics, that *these* neutral purchasers are acting as agents for the enemy, or are anticipating enormous profits from sales to the enemy, is wholly justified and most pertinent to the issue. Looking therefore at the case in the rough, the neutral American vendor, if he has acted with common prudence, is out of Court as a complainant. And, further, his position is vastly different from an ethical standpoint if he has chosen to give credit to the enemy, or to a purchaser who is probably the enemy's agent; still more different, almost dwindles to vanishing-point, if

he has sent the goods on the chance of 'payment if safe delivery.' From a purely commercial point of view, therefore, if seizures of such cargoes are to be made the basis of complaint by the Government as the legitimate mouthpiece of United States traders in the bulk, the only possible ground on which it could be presented is that they may affect trade generally; the complaint would be of 'the injury to American commerce as a whole,' as it was, in fact, put in the Note of the 28th of December.[7] But then the damage is too remote from the alleged wrongful injury to sustain a plea. Interference with trade is the inevitable consequence of war; the more strenuously sea-power is exercised the greater the interference, and the command of the sea inevitably makes the interference one-sided.

But it may, with respect, be questioned whether the allegation is correct. The effect of war on commerce *generally* must be judged by its results on commerce *as a whole*; there must be a general balance-sheet of United States trade in which the profits of some merchants must be set against the losses of others. Is it quite certain that American commerce as a whole has not derived much benefit from the War rather than suffered serious loss? There seems to be some confusion of the particular with the general. In regard to this ground of complaint war is entitled to the same treatment as the public good, which is never condemned for the individual wrong it does and must do, or the world would have stood still long ago.

[7] See p. 14.

The position of affairs may, therefore, be stated very clearly: only in those cases in which the property in the cargoes seized has not passed out of the vendor do the questions of contraband and blockade affect him. But where the property has passed to an enemy purchaser or his agent, then other questions arise which depend on the Declaration of Paris.[8]

The Declaration of Paris—Free Ships make Free Goods

The Declaration of Paris has been roundly abused by many who believe that it clipped the wings of England's sea-power, having been expressly designed thereto and weakly assented to by England. This provision—'Free ships make free goods'—covers goods consigned to an enemy Government! But looking at it merely as it affects neutral merchants, it fails lamentably as a practical doctrine, because in the attempt at conciseness its authors forgot to be explicit. As it stands it is not true. It has not interfered with the right of search because contraband of war is excepted, and the fundamental argument that you cannot seize if you cannot search, 'whatever be the ships, whatever be the cargoes, whatever be their destination,'[9] still holds good. Nor has it interfered with or curtailed the rights incident to blockade; then the doctrine of the Declaration vanishes, for there

[8] In order not to confuse the argument, I refer here specifically only to the case of a neutral vendor and an enemy purchaser. Where the purchaser is also a neutral trader the legal position does not alter until the facts make the case one of 'continuous voyage.'

[9] See p. 37.

are no 'free ships' by which the enemy's goods may be made free, all goods on board being liable to seizure.

But the great defect of the provision is that it leaves deplorably vague the question by whom the 'freedom' of the enemy goods may be raised: by the neutral carrier or the enemy owner; and it is precisely this point which seems to have been ignored in the American Protest.

This question also arises very directly under the Order in Council, for the first clause provides that the goods discharged from a neutral vessel seized on its voyage to a German port, other than contraband of war, shall, if they are not requisitioned for the use of His Majesty, 'be restored by order of the Court, upon such terms as the Court may in the circumstances deem to be just, to the person entitled thereto.' Now, if the property in the cargo has by law passed to an enemy purchaser certain questions as to the making of the order would, I presume, arise, which for obvious reasons I do not discuss. But it is quite certain that the American vendor could not appear and make the claim on behalf of such a purchaser; equally certain that the United States Government would have no *locus standi*. The position under the Order in Council is the same as would arise in normal circumstances if, for example, the question before a Prize Court were as to the 'effectiveness' of a blockade. The neutral owner of the ship would argue the case on his own behalf, but not on behalf of an enemy owner of the cargo. As, therefore, the United States Government

could not argue the legal case on behalf of an enemy purchaser, and as enemy purchasers are the persons specially cared for by this rule of the Declaration of Paris, it is difficult to see how it can argue the question diplomatically. But, not being altogether inexperienced in diplomacy, it has limited its protest to the case of its neutral merchants.[10] Then, with great deference, the invocation of the Declaration of Paris is irrelevant, for the whole point of the clause is the freedom of the goods and not the freedom of the ship; and the question of the freedom of the ship cannot be raised, because the exception of contraband of war from the rule carries with it a forced submission to the belligerent right of search. And, further, the question whether the Order in Council is an illegal extension of the law of blockade is not affected by the Declaration, but must be decided on other grounds.

But 'quick returns make rich merchants,' whether they result from small profits or large. And in war-time the neutral merchant, being a mere man of commerce, appears to be quite ready to 'pay for the boundless gain' which the sale of munitions gives him by taking the 'boundless risk' of seizure and condemnation, keeping the property in his cargoes while they are on the high seas. Should disaster follow, there is always 'the Government' to fall back on; and if only it can be persuaded to wave the banner of 'neutral rights' with sufficient dexterity, the chances are in favour of compensation. Now, if all neutral merchants would

[10] See the quotation from the Protest, set out on p. 89.

take Reason for their guide the Declaration of Paris would reveal hitherto unsuspected virtues. Let me commend the following brief articles to the consideration of the diplomatic professors at the next Hague Conference: First—'For the future avoidance of tortuous discussions so common in the past, the law of contraband, and so much of the law of blockade as affects neutral merchants, are hereby abolished, and all contracts for the sale of all goods whatsoever made between neutral and belligerent merchants shall for all purposes be deemed to be contracts f.o.b.' Secondly—'For the greater peace of the world, and the prevention of those financial difficulties hitherto so commonly resulting to private individuals from war, it is agreed that "free ships make free goods"; so only that such free ships, whatever be their cargoes, whatever be their destination, may be taken by either belligerent, without undue show of force or unnecessary use of explosives, into his nearest port, there to abide the decision of a Prize Court whether they be goods designed for the use of the enemy forces; and, if it be shown to the satisfaction of the Court that they be not so designed, then they shall be declared to be "free goods," and if the person entitled thereto be a neutral they shall be delivered up to him on such conditions as the Court shall think just; but if he be an enemy, other than the enemy Government, then they shall be held until the conclusion of peace, when they shall be delivered up.'

Is this a scheme straight from the Councils of Utopia? I wonder! Perhaps for the present

it may be left with the judicial formula 'I should like to hear the point argued.' But this is certain, that if contracts with belligerents were made with the same business caution as contracts in peace-time, all the clamour about the 'rights of neutral merchants' would die down, for they would have none which need protection, and Notes of friendly remonstrance and dexterously worded Protests would be unnecessary. But we live in an age of great unreason; and the law of contraband and all that part of the law of blockade which affects neutral merchants have been the inevitable result. The Declaration of Paris might have got rid of many difficulties with a little more study of actual facts, but it has not; and so, in spite of good intention, we must wrestle, and I propose now to wrestle, with the problems it has left unsolved.

The Effect of the Order in Council

The essential condition of blockade, as hitherto understood, is that the blockading squadron must be in the immediate offing of the blockaded port. We have placed our cruiser cordon at a considerable distance from the German coast. And here, to the general, is the stumbling-block in our way; to the American, is the sign of our backsliding. Yet, curiously enough, *if we had declared a blockade*, any question which might have arisen as to its validity owing to the position of the cordon is set at rest by the Protest itself.

The rules of international law can only preserve their vitality if they keep pace with the

progress of science; if they do not, they must pass into the limbo of forgotten things. Hence the necessity for a clear discernment between essential principle and unessential detail. In the first article I pointed out that this discernment was singularly lacking in the early protests of the United States Government. The details of our doings on the high seas were criticised as not being in conformity with action which tradition justified; our all-sufficient answer was that they were justified by the principles on which the traditional action was based. Now although, as I think, in this last Protest the American Government has judged what we have done by the narrow formulas of a bygone age, when it comes to treat of 'blockade' it frankly abandons them; it literally leaps forward, and brushing them aside shows us that we might have taken other measures of belligerent discipline which would have reacted far more seriously against the neutral merchant than those embodied in the Order. The American Government believes—it is, when untroubled by the complainings of its merchants, far too profound a student not to believe—that the law of blockade greatly needs rewriting. Rules which were adapted to Nelson's frigates can have little or no application to the battle-cruisers of to-day. But they were the outcome of a principle, and that principle remains. The American Government agrees that for a blockade the cordon of ships in the offing is no longer practicable in the face of an enemy 'possessing the means and opportunity to make an effective defence by the use of submarines,

mines, and aircraft,' and is therefore no longer to be insisted on. It believes that a 'long-distance blockade' is now inevitable. The importance of this admission cannot be exaggerated. It might, I should have thought, be contended that a 'blockade' cannot be effective if the enemy possesses sufficient means of offence—in other words, has the present means of destroying its effectiveness. It can never be sufficiently insisted on that 'blockade' has, in addition to its realities, a technical and highly artificial side. Under the conditions of warfare existing at the time the rules were evolved, the visible sign of its effectiveness was the presence of the blockading ships in the offing; that was the fact from which the danger to merchant ships trying to run in to the blockaded coast became evident. But if, whether by submarines, mines, or aircraft, this danger ceases to be evident, if it can be actually eliminated, if by the offensive protection of destroyers or cruisers there is an evident danger to the blockading squadron, it would seem to follow that both the real and the artificial effectiveness of that squadron would be destroyed. A blockade liable to be seriously questioned, the blockading ships to be annihilated, by an opposing squadron, seems to involve a contradiction in terms.[11] But all this is top-hamper of curious

[11] I put this forward purely as a theoretical consideration, because I am not sure that Nelson's historical blockades fulfilled the condition of not being subject to effective attack. But whether they did or not, the possibilities of destroying the actual as distinguished from the potential effectiveness of a blockade have been entirely altered by the modern appliances of sea-warfare.

argument, and must go by the board when modern fleets take up their war-stations. The enforcement of a 'long-distance blockade' is recognised by the American Protest as being one of their modern duties. But for what purpose? For that extreme exhibition of force which the command of the sea enables one of the belligerents to display in order to strangle the life out of the enemy. That is the principle of blockade—the exercise of sea-power to stop *all* supplies from going to the enemy, because he has that power; and the Protest admits that this power may now be exercised in a wider area than in days gone by: exercised against the enemy, and therefore exercised against the neutral merchant, whose chances of getting even those things to the enemy which had, before its exercise, been allowed to pass as non-contraband are correspondingly diminished. Let it be noted at once in italics that this admission comes from a Government which is the most powerful protester against infringements of what it holds to be the rights of neutral merchants.

The learned student detects here what appears to be an obvious flaw in the argument. He has been taught that 'a blockade must not extend beyond the ports and coasts belonging to or occupied by the enemy,' and that 'the blockading forces must not bar access to neutral ports or coasts.' The first and eighteenth articles of the Declaration of London have thus summarised the practice. The Government of the United States has not forgotten those elementary maxims; but it will not let them interfere with the develop-

ment of its theory of the 'long-distance blockade.' The principle on which they are based can well be preserved: 'If the necessities of the case should seem to render it imperative that the cordon of blockading vessels be extended across the approaches to any neighbouring neutral port or country, it would seem clear that it would still be practicable to comply with the well-recognised and reasonable prohibition of international law against the blockading of neutral ports by according free admission and exit to all lawful traffic with neutral ports through the blockading cordon.'

Very frankly, I have my doubts as to the soundness of the American contention. When this time of warfare is overpast and only its echoes remain, when another Conference shall assemble at the Hague to endeavour to read its lessons more surely than its predecessors had learnt those of previous wars, I doubt whether this new doctrine of blockade will find much favour; for if it is accepted as an 'effective blockade' the artificial side of the law must also be accepted, and a temporary withdrawal on account of stress of weather must be declared not to raise it.[12] But of this I have no doubt, that the principle on which blockade rests will always be recognised, must always be recognised because it is a fact—that a belligerent will, and therefore, as we are used to say, 'may,' resort to the final strangling process whenever he has the power, because he has the power; of this no arbitrary rules can

[12] See p. 44.

deprive him. I believe that when things come to be weighed in the balance, when Time's just sentence is pronounced, it will be that the new Order in Council indicates the proper method by which a belligerent may, in view of the advance in the methods of naval warfare, now exercise that strenuous and strangling pressure upon the enemy which in old days he was entitled to do by means of a technical blockade, and that in the way it deals with the neutral merchant it has found the correct solution of that part of the problem.

A great point is also made by the United States Government that the Order in Council is invalid because, if it is to be considered as a blockade, it discriminates against the United States and is not enforced against those countries which, owing to their contiguity to Germany, are inside the cruiser cordon. The principle on which this complaint is based is thus given in Article 5 of the Declaration of London :—'A blockade must be applied impartially to the ships of all nations.' This principle is an integral part of the old system of blockade, under which access to neutral ports or coasts may not be barred by the blockading forces (Article 18 of the Declaration). But it is manifest that directly the principle of the 'long-distance blockade' is admitted the access to neutral ports must be interfered with; and the Protest expressly recognises the necessity of admitting this principle. Moreover, it would seem that Article 5 of the Declaration applies to an intentional discrimination between the ships of

different countries by the blockading belligerent. It is clear that the United States Government does not interpret the article to be, from reasons of geography, an impediment to the new form of blockade which it has expressly approved.

The Relation between Contraband of War and Blockade

Let me now try to make things a little clearer. We are so accustomed to the grooves in which our thoughts have been trained to run that we are apt to overlook the intimate connexion which exists between the law of contraband of war and the law of blockade. They are treated as isolated doctrines, as independent branches of the law. The American Protest declares them to be separate 'concessions' by neutrals to belligerents. Discussed, as they are, in terms which have no common denomination of language, comparison between them has become, if not impossible, certainly unusual.[13] Let us then reduce them to a common denominator. If we talk of both in terms of belligerent action we find in the law of contraband the right of search as a preliminary to seizure, in the law of blockade the right of seizure without search. In terms of the cargo seized, we find the first limited to contraband of war, the second unlimited. But this is not very satisfactory; it does not explain why, if the neutral merchant has any *rights* in regard to non-contraband, the belligerent may destroy them by declaring a blockade.

[13] See the footnote on p. 95.

It appears to lead to some such general principle as this: when neutral vessels come within a certain distance from the enemy's coasts (the offing) a belligerent may seize anything and everything, but until they come within that distance he can only seize contraband of war: which is not an accurate statement of the law. 'Belligerent right' is clearly the common factor; a belligerent has the right to declare what shall be contraband of war; he has the right to declare a blockade. The variant is the position and number of ships he makes use of, the exhibition of sea-power by which both rights are enforced. So we get to this result: that when there is a cordon of cruisers the belligerent may seize anything, but when there are only isolated ships he may only seize contraband of war.

This test ceases to be rudimentary when we introduce another factor common to the two subjects — effectiveness. That the belligerent's naval dispositions must be capable of doing what he proposes to do—in other words, must be effective to that end—is no less a feature of the law of contraband than it is of blockade. Carrying contraband of war and blockade-running are not offences; the evil consequences, which authors insist on calling 'penalty,' result from capture. Therefore in both cases what the belligerent *may* do is only qualified by what he *can* do. That sub-conscious recognition of the possibility that a belligerent may put far greater impediments in the way of neutral communications with his enemy than is implied in the law of contraband,

becomes now the conscious principle which I gave in outline in the first article: that 'contraband of war' and 'blockade' are identical in principle; that they are merely convenient names given to varying exhibitions of sea-power against the enemy, and the consequences, to enemy and neutral merchant alike, do in fact depend on and vary with the force exhibited—that is, with the number and position of the ships employed upon the service, which, if effectively performed, results in both cases in seizure and condemnation.

Blockade in principle is, therefore, nothing more than an indefinite extension of the list of contraband of war, subject only to the requirement that a sufficient number of ships should be placed in such a position as to make this extended threat of seizure effective. This then is practically what the Order in Council does; and even if it insisted on condemnation in all cases it would be justified, for it satisfies the test which this analysis shows to be the true test, and the only test, that the ships employed upon the service, both as regards number and position, shall be effective for its due performance.

Now, seeing that the Order pays so great regard to the pocket of the neutral merchant that it does not condemn *his* non-contraband cargoes, it is very difficult to discover any justification for protest. Shorn of superfluity of words, the complaint is that we have not declared a blockade; and it resolves itself into this: that we ought to seize and condemn neutral cargoes and not rest satisfied with what may be termed an interim

seizure, which may not become absolute. The answer is that the existence and extent of a right does not depend on the nature of the procedure by which it is enforced. It is true that international law has invented a fiction to assist the belligerent who decides to declare a blockade; it preserves, *as against the neutral merchant*, the 'evident danger of seizure' even when owing to stress of weather it has ceased not merely to be evident, but to exist altogether. What can this fiction have to do with the nature of the right to which it is a mere adjunct? the right to stop *all* supplies going to the enemy. It is preposterous to say that a belligerent cannot exercise this right unless he avails himself of the adventitious assistance which the law offers him; that although he *can* do without it yet he *may* not.

What is true of the deep sea must also be true of the high air. When the lorries and cargo-carriers of the air have come into being, and the war in the air becomes even more of a grim reality than it is to-day, neutrals carrying supplies to the enemy will, I imagine, receive short shrift, contraband or no contraband, siege or no siege, blockade or no blockade.

The Sovereignty over Neutral Ships

But the United States Government rests its protest on an alternative ground. The Order in Council, it declares,

> would constitute, were its provisions to be actually carried into effect as they stand, a practical assertion of unlimited

belligerent rights over neutral commerce within the whole European area, and an almost unqualified denial of the sovereign rights of the nations now at peace.

This Government takes it for granted that there can be no question what those rights are. A nation's sovereignty over its own ships and citizens under its own flag on the high seas in time of peace is, of course, unlimited. And that sovereignty suffers no diminution in times of war except in so far as the practice and consent of civilised nations have limited it by the recognition of certain now clearly determined rights which it is conceded may be exercised by nations which are at war.

A belligerent nation has been conceded the right of visit and search, and the right of capture and condemnation if upon examination a neutral vessel is found to be engaged in unneutral service or to be carrying contraband of war intended for the enemy's Government or armed forces. It has been conceded the right to establish and maintain a blockade of an enemy's ports and coasts, and to capture and condemn any vessel taken in trying to break the blockade. It is even conceded the right to detain and take to its own ports for judicial examination all vessels which it suspects for substantial reasons to be engaged in unneutral service, and to condemn them if the suspicion is sustained. But such rights, long clearly defined both in doctrine and practice, have hitherto been held to be the only permissible exceptions to the principle of equality of sovereignty on the high seas as between belligerents and nations not engaged in war.

If the rights of the neutral merchant are no greater than I have stated them in the first article, and he acts at his own peril and is entirely independent of his own Government, and if the rights of the belligerents are as large as I have there

stated them, then it follows that there can be on question of 'concession' by the neutral merchant's Government, in regard to either contraband or blockade, but only an assertion of belligerent right,[14] and all questions as to the sovereignty of that Government over its merchants' ships disappear. When the neutral merchant is carrying contraband, or when he is blockade-running, he deliberately runs his risk, and therefore cannot claim the protection of his flag.

I think I am not overstating the case when I say that the doctrine on which the United States Government rests its case against us is the exact opposite of this. The prominent position which it holds in the Protest shows that it is regarded as the key-stone of the argument, and that if that key-stone is withdrawn the whole argument must fall to pieces. At the risk of repetition I shall quote again a passage from 'Historicus,' referred to in the post-script to the first article, in which he examines the terms of the British proclamations of neutrality. Using his own language, 'the vital importance of this matter to the great issues' which have arisen between the United States and Great Britain, 'must be my excuse. . . . The interests of peace demand that there should be no doubt on this question.' In these proclamations, he says, the nature of the consequence, commonly called a penalty, of trading in contraband of war 'is pointed out with equal clearness and correctness—*viz.* the withdrawal of the Queen's protection from the contraband on its road to the enemy, and an abandonment of the subject to

[14] See p. 62.

the operation of belligerent rights.'[15] And again, 'when the neutral Sovereign has withdrawn from his subjects engaged in such a trade the protection of his flag, he has discharged the whole duty of neutrality.'[16] To withdraw protection from the merchant when he sets out on his risky adventure, to abandon him during his adventuring to the exercise of sea-power by a belligerent which it is admitted he must exercise because he is at war, is inconsistent with any notion of *concession*. A neutral vessel carrying contraband is in no better case than if she wore no flag. The *fact of the contraband being on board* withdraws her from her national protection.

Further, the laws of the United States (which may be taken as typical of neutral countries), 'do not forbid their citizens to sell to either of the belligerent Powers articles contraband of war, or to take munitions of war . . . . on board their private ships for transportation.[17] It is impossible, therefore, to say that the neutral Government—except only when an embargo has been declared—exercises jurisdiction over such private ships, for the national law creates no offence which could give jurisdiction. Therefore it is clear that the neutral vessel by carrying contraband or running blockade puts herself deliberately, and with the acquiescence of her own Government, at the mercy of the other belligerent, and submits to the exercise of belligerent rights.[18]

[15] *Letters of Historicus*, p. 132, quoted *ante*, p. 48.

[16] *Ibid.* p. 136.

[17] President Pierce, cited *Letters of Historicus*, p. 132.

[18] As an illustration of the scrupulous exactitude of the appeal to principles by President Wilson in his recent Notes to Germany, I may

The right of search might be looked on as a concession, or an infringement of jurisdiction, in the case of ships not carrying contraband. Yet even this does not bear analysis; for, as 'Historicus' points out, 'when a trade in contraband is notoriously and extensively carried on, it exposes the innocent as well as the guilty to suspicion and search, and this is precisely why the Queen in her proclamation of neutrality exhorts her subjects to abstain from such a trade.' [19] The proclamation in fact admits that this search of *all* vessels on suspicion is an integral and inevitable part of the right of search. It is not a concession, but only the logical extension of the belligerent right to capture contraband on neutral vessels, and to take all steps necessary to attain that end. It is a part of the belligerent right. This question does not arise in connexion with blockade, for there there is no search, and all things become contraband of war.

refer to the distinction he draws in the Note of June 11, between the duty of a neutral Government to enforce its own laws in regard to granting clearances to vessels carrying cargo prohibited by those laws, and the grant of clearances to vessels carrying contraband of war: 'Performing its recognised duty as a neutral Power and enforcing its natural laws, it was its [*i.e.* the Government of the United States] duty to see to it that the *Lusitania* was not armed for offensive action, that she was not serving as a transport, that she did not carry cargo prohibited by the statutes of the United States, and that if, in fact, she was a naval vessel of Great Britain she should not receive clearance as a merchantman. It performed that duty. It enforced its statutes with scrupulous vigilance through its regularly constituted officials. . . .' The performance of these express duties is treated as distinct from the contention of the German Government that the carriage of contraband of war was a violation of American law.

[19] *Letters of Historicus*, p. 177.

The Doctrine of 'Continuous Voyages' and the Order in Council

But although I have been obliged to devote great space to these preliminary subjects, the point of the Protest is still to come. The condition attached by the United States to its theory of the 'long-distance blockade' is that free admission and exit must be accorded 'to all lawful traffic with neutral ports through the blockading cordon.' 'Lawful traffic,' it is explained, 'would of course include all outward-bound traffic from the neutral country, and all inward-bound traffic to the neutral country except contraband in transit to the enemy.' This must be read with a sentence which occurs earlier in the Protest :—

> It is confidently assumed that His Majesty's Government will not deny at once [*i.e.* presumably, 'will at once admit'] that it is a rule sanctioned by general practice that, even though a blockade should exist and the doctrine of contraband as to blockaded territory be rigidly enforced, *innocent shipments may be freely transported to and from the United States through neutral countries to belligerent territory* without being subject to the penalties of contraband traffic or breach of blockade, much less to detention, requisition, or confiscation.

At last we have the real issue. Assume everything in our favour : that our blockading cruisers are rightly standing far out to sea ; that we should be justified in condemning the cargoes seized instead of returning them to the persons lawfully entitled thereto : the United States denies that its own particular doctrine of 'continuous voyages' can apply to a 'long-distance blockade.' And

here undoubtedly the books seem to be in its favour, for the rule they give, embodied in Article 19 of the Declaration of London, is shortly this: the doctrine of 'continuous voyages' does not apply to a blockade. This is the logical consequence of the principle to which I have already referred; that the blockading forces must not bar access to neutral ports, because the doctrine of 'continuous voyages' expressly deals with cargoes on vessels bound for neutral ports. But it would seem to follow that with the disappearance of the offing from the definition of 'blockade,' and the consequent legitimate interference with access to neutral ports, the application of the doctrine of 'continuous voyages' must follow as a matter of course. The fact is that the United States Government has not fully counted the cost of its own admission. As I have already shown, once the theory of the 'long-distance blockade' is admitted the principle of non-discrimination, a legal nicety appurtenant to the old blockade, goes by the board, because geography compels an involuntary discrimination against neutral countries which are outside the cordon; so it is clear that this other principle of non-application of the doctrine of 'continuous voyages' to blockade must also go by the board, because it is the result of principles specially applicable to the old blockade.

The doctrine of 'continuous voyages' holds no precious mystery; it never meant more than this: that what the neutral trader cannot do directly without running the risk of seizure and condemnation he cannot do indirectly without

running that risk. And whereas, as has been shown, the right to blockade the enemy is in principle no more than the right indefinitely to extend the list of contraband of war against the neutral trader, this must apply equally whether cargoes are going directly or indirectly to the enemy.[20]

The discussion of narrow rules hinders the clear vision of the things which are; and of these the all-important one is that, call it by what name you please, a belligerent *will*, whenever he has the power, take the necessary steps to cut off *all* supplies from the enemy; and he will cut them off whether they are going by direct route or indirectly through a neutral port. The old conditions under which that power was exercised have, it is agreed, passed away; the power, which we call the right, remains. The Government of the United States contends, on behalf of its merchants,

[20] I gather that the meaning of the official answer, dated March 19, to the distinguished chemists who were agitating for the inclusion of cotton in the list of absolute contraband is that their views have been met by the Order in Council. This answer, as printed in the papers of April 6, 1915, was as follows:—

War Office,
High Explosives Department,
19*th March*, 1915.

Institution of Mechanical Engineers,
Storey's Gate,
Westminster, S.W.

DEAR SIR,—Lord Moulton desires me to acknowledge your letter of the 11th March covering a further letter signed by various gentlemen.

Lord Moulton feels that you will be entirely satisfied by the terms of the Order in Council dated the 11th day of March, 1915, which appeared in the Press of the following day.

Yours faithfully,
J. BAZIRE.

that they have the right to evade and therefore to nullify that power by supplying the enemy, indirectly and without risk, with those cargoes which they cannot safely supply him with directly. Surely the proposition is impossible on the face of it. To call such cargoes 'innocent' is to beg the question. The introduction of the atmosphere and terms of the criminal law has done more to fog the public comprehension of this branch of international law than any inherent complexity of the problems with which it deals. Yet here it will serve to bring home the inaccuracy of the American contention to the public mind; for seizure and condemnation become a sort of retributive penalty for the neutral merchant's attempt to evade what, to continue the language of law, the belligerent has the right to command, by darkening and disguising his real intention. Judged even by this imperfect standard, the American Protest has cut away the ground from its own contention. The doctrine of 'continuous voyages' was accepted because of its logical simplicity; and this simplicity shows that it must extend and reinforce every exhibition of sea-power by a belligerent against his enemy; and its logic prevents the neutral merchant from setting up any right, more especially any right which is not only in conflict with the belligerent right, but is based on deceit and needs a cloak to hide its real meaning. The right he claims is to send to the enemy those supplies which the belligerent has declared his intention and taken effective steps to deprive him of. If the neutral merchant had such a right it would enable

him to diminish the force of the belligerent blow, to heal the stroke of the wound.

Reprisals

There has been much talk of retaliation. The Order in Council has adopted the formula of the first of the Orders in Council of 1807,[21] that the action of the enemy has given to His Majesty the 'unquestionable right of retaliation,' and it has been assumed, too readily as I venture to think, that this is an admission that our action to-day falls outside the principles sanctioned by international law. The American newspapers have found apt expression of their criticism in the ancient adage 'Two wrongs do not make a right.' And in the Protest of the Government this sentence occurs:

> If the course pursued by the present enemies of Great Britain should prove to be in fact tainted by illegality and disregard of the principles of war sanctioned by enlightened nations, it cannot be supposed, and the Government does not for a moment suppose, that His Majesty's Government would wish the same taint to attach to their own actions, or would cite such illegal acts as in any sense or degree a justification for similar practices on their part in so far as they affect neutral rights.

A comparison of the measures taken by the Order in Council with those ordered by the German Admiralty can hardly have been seriously intended; yet to many this sentence seemed to be straining diplomatic proprieties to their utmost limit. But any irritation it may have caused has been blotted

[21] Dated January 7, 1807.

out by the stern words of disapproval used by the President in his recent Notes to Germany.

But the reference to retaliation cannot, as it seems to me, be legitimately construed into an admission of the illegality of the measures decreed by the Order in Council. The utmost that can be said of it is that it admits they are exceptional. The Order of 1807 declared that 'no vessel shall be permitted to trade from one port to another, both French,' and it was enforced by seizure and confiscation of neutral vessels which disregarded it. That and the other Orders which countered Napoleon's paper blockade of the English coasts have been severely criticised; but it is impossible to apply the same criticism to an Order which omits the confiscation, and on the contrary, expressly provides for the return of both ship and cargo to the neutral merchant. That the measures are exceptional may be freely admitted, and to that extent they may be called reprisals; but exceptional measures, even of reprisal, are not necessarily illegal measures.

The American Caveat

The strangest part of the correspondence remains to be noted. The United States Government, in July, lodged a *caveat*, intimating that it 'will not recognise the validity of Prize Court proceedings taken under restraints imposed by British municipal law in derogation of the rights of American citizens under international law.' The Government has thus indicated the retali-

atory measures it proposes to take against Great Britain; yet it has failed to see that the veiled irony of the paragraph just quoted from the Protest applies in its entirety to this reprisal. In so far as it relates to executive action, it proposes to accomplish the impossible. Prize Court judgments are *in rem*; they pass property, and if possession has followed not even the United States Government can undo it, for there would not be even a tenth point on which it could seize; and if possession has not followed, Government action would be brought up short by the law. Further, in so far as it relates to judicial action, the intention appears to be to give an instruction to the American Courts how in the circumstances they are to deal with the decisions of the English Prize Courts. Thus the constitutional principle of the independence of the Judiciary from the Executive is put in jeopardy, and the Government would again be brought up short by the law. And in so far as it relates to the law itself, the proposed action professes to decide favourably to the present contention of the United States a difficult and complicated question of law—whether judgments based on a municipal law which, it is alleged, is a violation of international law are not entitled to recognition by foreign Courts, more especially if they are judgments *in rem*. Such a decision does not fall within the province of the Executive, but only of the Courts. So, as it was said aforetime in the British argument in the Behring Sea Arbitration, to all and every part of the different protests which have been

made against our action by the United States Government, there is, with profound respect, 'but one answer—the Law.'

In an Editorial Note in the May number of the *North American Review*, dealing with the relations between Great Britain and the United States after the detention of the *Wilhelmina*, this sentence occurs :

> If we should once admit the right of the Allies to forbid our sending foodstuffs to Germany, how could we deny the justice of Germany's insistence that we should apply the same principle to England ? And what would happen to the English people then ? Surely, too, our British friends must realise that only the strictest adherence to international law makes it possible for us to furnish to the Allies the vast quantities of war munitions without which they could not hope to win.

The great friendliness of its tone cannot but be grateful to us ; yet in this short sentence all the fallacies and misconceptions of the real nature of the neutral merchant's position are concentrated. I have endeavoured to show that we have claimed to exercise a right which a fuller examination of admitted principles shows to be entirely warranted, that the only thing which stands in the way of the prompt admission of its legality is a popular conception of belligerent rights which unduly confines them within limits which have proved themselves to be impossible in modern conditions of war. Law once was the handmaid of commerce : she has long since become its mistress. But what, for want of a better name

we call international law is still in a state of servitude. If its doctrines are to be treated as intelligible they must be considered as a continuous development springing from, and as the inevitable consequence of, the first cause, that two nations are at war. Then War becomes the key-note, subdominant, dominant, leading note, every note of the scale of action throughout the world, and the neutral merchant cannot pitch the tune as it may best suit his interests.

Is then the justification for the new procedure of the Order in Council an ultimate reference to Might is Right? Have I, following far behind the United States Government in the strenuousness of the law as I have formulated it, found also a justification for the German who relies on Might without troubling to assert the Right? Surely not. I have striven to base the whole law and every part of the law as it affects the neutral merchant on the plain fact that all exercise of might against the enemy, so long as it comes within the laws of humanity and the rules of war, is justifiable, and the omission of it mere folly, and that it is not limited by considerations of time and space; and on this still plainer fact that the exercise of might against the enemy engenders 'right' against such neutral merchants as do, of their own free will and with eyes open, bring themselves within the scope of it.

P.S.—I have dealt with the subject on the supposition that all contracts are made after the

declaration of war. But much foreign trade is carried on by ' long-distance ' contracts, and neutral merchants who have entered into continuing contracts before the War would seem to demand special attention, for their eyes were not open, and the risk of seizure by a belligerent has caught them awares. Speaking generally, it is here that the consideration shown to the neutral merchant by Great Britain may find full scope for action. But I admit quite frankly that so much of my argument as is personal to the neutral merchant does not apply to this category. On the other hand, the law of contraband, with its adjunct the doctrine of ' continuous voyages,' and the law of blockade, as they have been understood in the past, do not exempt them from the rigours of their operation. Yet the fact remains that the new development of the law does impose upon them greater risks than they ran heretofore, and a protest specially devoted to their hard case would, I imagine, if it were limited to contracts relating to non-contraband and to contracts not made with the enemy Government, receive careful consideration.

III

COTTON AS CONTRABAND OF WAR

[*September* 1915]

Cotton proclaimed Contraband of War—Public Demand for the Proclamation—The answer to the Critics of the Government—'Continuous voyages' and the Order in Council—Possible combination of Contraband and Blockade—American reply to Austrian Note.

RAW cotton has been proclaimed contraband of war.[1] I may therefore fill in a blank space in what I have written in the previous articles on the law of contraband of war and the law of blockade. It was obviously impossible while the matter was, as it were, *sub judice*, to point the moral of the doctrine advanced in those articles—which I believe to be most sound doctrine—that 'the right to blockade the enemy is in principle no more than the right indefinitely to extend the list of contraband of war against the neutral trader,'[2] by a reference to the 'cotton question.' But I am free to do so now.

[1] By Proclamation, August 18, 1915.

[2] The opposite principle is that of the 'watertight compartments,' to which reference is made later. It has Westlake's support, whose opinion was thus quoted with approval by Mr. Pawley Bate in a learned article in the July number of the *Quarterly Review*: 'No attempt to find a sound juridical basis for blockade has succeeded. Nothing higher than "compromise by tacit international agreement" can probably be found.'

Public Demand for Cotton to be made Contraband of War

I must confess that the movement, of which the Proclamation is the outcome, in its later stages has filled me with amazement; more especially the way in which, the object attained, the announcement of its issue has been received. A sigh of relief has gone up: 'At last!' it is said, 'the Government has given way, and the step has been taken which should have been taken at the beginning of the War.' There is a gratified assumption that those who have fought the good fight have triumphed over a stubborn lot of procrastinating and incompetent Ministers. Some even suggested, when the decision was announced, that a wicked Government might, after all, only make cotton conditional contraband, for was it not a Government prone to subterfuge?

The leaders in the fight, the distinguished chemists, are so eminent that I refrain from applying to them the term 'agitators'; they are so eminent that I am sure they will bear with me patiently while I explain why, even though they appear to have accomplished it, they were trying to shut a door that was already closed, for 'sweet reasonableness' is an attribute of all eminence. It is not necessary now to inquire what were the reasons which induced the Government to refrain from putting cotton on the list of absolute contraband during the first six months of the War; it was a policy deliberately adopted by responsible Ministers; whether it was the right or the wrong

policy is not the question which the leaders of the movement have put in issue. The errors of the past were at length to be retrieved.

By the Order in Council of the 11th of March, a new policy was adopted which, in the opinion of the present Government, should have been effective to achieve what all desire—the prevention, by all possible legitimate means of warfare, of cotton, as well as everything else, from reaching Germany. This was intimated in Lord Moulton's answer of the 19th March to the distinguished chemists who had moved in the matter ;[3] and it was more fully explained by Lord Robert Cecil in the House of Commons in August. It is that policy which has been so vehemently attacked as insufficient, as part of our ' sorry record in the cotton question.' It was contended that in spite of the far-reaching effect of the Order in Council it was necessary further to reinforce the powers taken under it by putting cotton on the list of contraband of war ; and the Government have now done what they were asked to do.

The criticism of the Government took two forms, one of which was serious. The other may be dealt with summarily. It was to the effect that the Order in Council ought to be revoked because, so it was said, many lawyers considered it to be contrary to international law, and that it should be replaced by some provision dealing specially with cotton. I have endeavoured in the preceding articles to show that this opinion of my learned brothers, if indeed they hold it, is erroneous. But,

[3] See p. 87.

putting this on one side, I believe the sound and only rule of speech and of the pen for Englishmen while the War lasts to be *omnia præsumuntur rite esse acta.* Criticism, based on learning or otherwise, of action taken by the Government against the enemy is out of place in time of war. The fact that such action affects neutral merchants injuriously does not justify criticism, for whatever weight it may have, by so much it adds to the difficulties, already immense, of temperate discussion with neutral Governments; by so much it heartens the enemy who seeks *per nefas* to render the discussion intemperate. For the present, therefore, at least a judicious silence is the better and the wiser part.

But criticism of inaction of the Government in regard to the enemy stands on a different footing, and, so only that it conform to one condition, it is permissible. That condition is the not unimportant one—full knowledge of all the facts. The eminent chemists and others who have been so vehemently urging the Government to make cotton contraband of war were critics of alleged inaction, and so far their position was unimpeachable; but, I venture with respect to ask them, did they know *all* the facts? They certainly knew one fact—that, at the time they approached the Government, Germany was getting too much cotton; and realising the intimate connexion between this and the ever-growing lists of casualties they were deeply stirred, as all of us who are condemned to sit at home at ease were deeply stirred when we came to understand. But emotion is apt to cloud

clear mental vision, and we have been asked by some persons to believe that those others, men like ourselves, who form the Government of the nation, having eyes yet see not the plain things that are going on before them. And yet those are the only men among us who know *all* the facts. The critical point, however, is not whether Germany has been getting too much cotton, but whether she has been getting it because the Government had not taken sufficiently strenuous measures to prevent it. This being assumed in the affirmative, these eminent critics further assumed that declaring cotton to be contraband would be more effective in preventing it from getting to Germany than the procedure authorised by the Order in Council.

The Answer to the Critics of the Government

None of us know what is actually happening on the high seas in the area controlled by our cruiser squadrons, though the statistics just published by the Foreign Office somewhat lift the veil. We cannot, therefore, do more than consider the abstract question of principle, whether it was necessary to supplement the Order in Council by a proclamation of contraband so as more effectually to prevent cotton getting through to Germany; and it seems to me essential to a right understanding of the discussion that we should consider it.

Now there is one fact which I should have thought would at once have disposed of the whole contention of the critics—the Protest of the United

States Government. That Protest declares that in the Order in Council we have gone to lengths in interfering with American trade (which includes trade in cotton) hitherto unknown to international law, more especially in stopping that trade, asserted to be ' innocent ' but manifestly the opposite, on its way to neutral countries. In all friendliness that Government exhorts us, among other things, to revert to the time-honoured practice of relying on declarations of contraband. It appears, therefore, that the United States Government charges us with doing precisely what our own critics condemn Ministers for not doing, except by ' a half-hearted expedient '—stopping ' innocent ' cargoes of cotton. That Government insists that the correct way of preventing cotton reaching the enemy is to shut ourselves up in those old watertight compartments of international law labelled ' contraband ' and ' blockade.' They want to entangle us in that incomprehensible ravel of illogic into which those doctrines of international law have got themselves. Paraphrased, what the American Government says is this—declare a blockade, even though it be a ' long-distance blockade,' which they are willing to concede to be our right, and then we may stop all cotton going direct to German ports, though not, as the text-books point out, cotton going indirectly to Germany through neutral ports ; or, declare cotton to be contraband, and then we may stop it even though it passes through neutral ports. But as we had done neither of these things *in express terms*, Germany must be allowed to get her ' innocent ' shipments of cotton by way of

neutral and contiguous ports. Verily, the American fowler spreads the net in the sight of the British bird.

Here is the substance of the whole discussion. The Judges of the United States, with clear-cut thought, declared, half a century ago, that the doctrine of 'continuous voyages' was the inevitable complement to the belligerent right of stopping munitions of war and their component substances on the high seas on the way to the enemy. In other words, that the doctrine completed the law of contraband of war. The British Government, has, by the Order in Council, declared that doctrine equally to be the inevitable complement to the more extended belligerent right of stopping *all* supplies from reaching the enemy. In other words, that the doctrine completes the law of what we have called the 'new blockade.'

This, then, is the clear issue raised by the Order in Council for the judgment of any tribunal, national or international, to which it may hereafter be submitted, and of the world to which it is now submitted. And the position is, in my humble judgment, and in spite of the critics on our own side, unassailable. Nations, no more than individuals, are not to be bound by mere phraseology, especially in such a subject as this, without knowing what the terms used mean. 'Blockade' is a mere term, explaining what belligerent nations do, but not why they do it nor why neutral nations silently acquiesce.[4] It tells

[4] I refer in support of this statement to Westlake's opinion, cited in the footnote on p. 95.

nothing of the right to do it. On the contrary it seems, for a hundred years, to have successfully blinded men by its technical conditions to the fact that the so-called right to declare a blockade is no more than a declaration of an intention by a belligerent to stop *all* supplies from going to the enemy, and stopping them. Is it not abundantly clear that that intention cannot be nullified by the cleverness of the neutral merchant in ' darkening and disguising ' the fact that they are going to the enemy ? That, then, we have declared by the Order in Council to be our intention, and we have acted on it. It may be that, in regard to cotton, we have exercised it imperfectly ; some neutral merchants may have successfully evaded the vigilance of our ships. Human agencies are never quite perfect ; of all, even though they be official, Rostand's philosophy is, alas ! too true :

> Sache donc cette triste et rassurante chose,
> Que nul, Coq du matin ou Rossignol du soir,
> N'a tout-à-fait le chant qu'il rêverait d'avoir.

But because the ingenuity of the neutral merchant and his confederates has, as it is said, so far greatly baffled the vigilance of the mightiest fleet that ever stood guard upon the sea, the critics of the Government protest that we should fall back on the lesser remedy of declaring cotton contraband, and revoke, abandon, or ignore the more strenuous remedy provided by the Order in Council. It is difficult to appreciate the position these critics take up ; it can only be explained by

a lack of understanding of the real meaning of the Order. This these articles have endeavoured to do.

But, curiously enough, there is just one point where the combined operation of the laws of contraband and of blockade *may* increase our power of seizing cotton. It follows from what I have said in the second article with reference to the importance of reducing both laws to a common denomination of language,[5] that the reinforcement of even our 'long-distance blockade' by the addition of cotton to the list of absolute contraband will enable us to seize cargoes of cotton by isolated cruisers before the neutral ships which carry them reach the area in which the cordon of cruisers is operating. If this is a valuable power, as to which I am sceptical, it is right that it should be claimed and exercised; and it is one of the powers which result from the new Proclamation. I feel sure that the critics of the Government had not this addition to our powers solely in their minds; they certainly did not so formulate their criticism.

But the action which the critics wanted the Government to take has been taken; and I think the reason may not be far to seek. The American merchant, like his Government, believes that there is much virtue in technical terms. He says 'put cotton on the list of absolute contraband; I know what that means; then I shall know where I am.' I pointed out in the first article that the problem of the neutral trader is a very complex one, 'for each belligerent as a buyer must strive

[5] See p. 77.

to keep him in a good humour, but as a fighter must do all he can to thwart him.'[6] The cotton-grower of the Southern States prefers to be thwarted in this manner, and the British Government has humoured him. He prefers the risk of confiscation to the possibility of having his cargo returned to him if he is 'the lawful owner thereof.' So all is well.

The comments which have appeared since the Proclamation was issued have laid much stress on the deterrent effect it is bound to have on the cotton shippers, because the Order in Council does not provide for confiscation of cargoes of non-contraband, whereas now that cotton is contraband it must be confiscated. Also the complaint has been revived that the Order in Council was loosely enforced, and it is imagined that the declaration of contraband will of itself ensure a stricter supervision of cargoes of cotton at sea. It is difficult to follow either arguments, even on the supposition that this latter criticism is justified. For the machine by which both the Order in Council and the contraband Proclamation must be carried out is the same—the Fleet. The effectiveness of this machine, the efficiency of the Fleet, is obviously the dominating factor of the situation, whether it be governed by the Order or by the Proclamation. The deterrent nature of the fact that confiscation is now inevitable may possibly reduce the number of cargoes of cotton with which the Fleet may have to deal, but the other fact remains, that

[6] See p. 6.

the Fleet will deal with them whatever may be their number.

There has also been, even in very responsible quarters, some rather confused talk to the effect that the result of the contraband Proclamation is to 'improve our international legal position.' If this means anything it implies acquiescence in the American argument that the Order in Council is not warranted by international law. Such an argument, as I have already said, is more than inopportune at the present time; those who use it would, I presume, be pleased to see the Order in Council revoked altogether. I trust, on the other hand, that nothing that I have said will be construed to suggest that the Government in yielding to the clamour of the critics has issued a futile Proclamation. Yet it is impossible to imagine that Ministers have lost faith in the virtue and efficacy of the Order in Council. The latest statement in Parliament, by Lord Robert Cecil, which I have already referred to, shows that they have not. The Proclamation does, as I have shown, strengthen the position in some slight measure; but there is a well-known form of legislation often resorted to 'for the quieting of doubts,' which does not give away the situation. Such I believe this Proclamation to be.

But for the sake of the science of international law, in the preservation of which both the British and the American Governments are profoundly interested: for the sake of that cardinal principle that as weapons of war increase in their power

of destruction so must the belligerent might and right also increase, and new means must be found for keeping the new manifestations of sea-power within the old principles: for the sake of our duty of loyal belief that the Order in Council has devised those means in most legitimate fashion, let not the critics of the Government, learned or unlearned though they be, lay the flattering unction to their souls that they have won a famous victory.

P.S.—I take this opportunity of referring to the American reply to the Austrian Note which complained that the sale of munitions of war by United States merchants to the Allies was a breach of neutrality on the part of the United States Government. The Note was in the forcible-feeble style. It gave me the impression of having been written to order of the German Government by men who had not much belief in the soundness of their argument. It very clearly showed that necessity 'knows no law,' for erroneous doctrine was assuredly never so weakly stated. But it gave President Wilson an occasion of finally disposing of the false, and of asserting the true, principles of neutrality. It disposes also of the notion prevalent in some quarters, to which I referred in the second article, that the President's 'sense of fairness'[7] had something to do with our continuing to receive munitions of war from the United States. The reply has not been much

[7] See footnote on p. 59.

noticed, but it deserves transcription as a most masterly statement of law and policy: 'The principles of international law, the practice of nations, the national safety of the United States and other nations without great military and naval establishments, the prevention of increased armies and navies, the adoption of peaceful methods for the adjustment of international differences, and, finally, neutrality itself, are opposed to the prohibition by a neutral nation of the exportation of arms and ammunition or other munitions of war to belligerent Powers during the progress of the War.'

I draw special attention to the sentence 'the national safety of the United States and other nations without great military and naval establishments'; these are the nations, small in their powers of defence, who, as I have pointed out, must go to the wall if the wild dream of neutralizing the sea should ever be allowed to materialise.[8]

[8] See p. 35.

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